Supreme Court, U.S.
FILED
JUL 26 2004
OFFICE OF THE CLERK

No. ~~04-168~~

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Lee Grimm,
Petitioner,

v.

Charles S. Spell, a.k.a. Steve Spell,
Peter Vasquez, and
Prosscovia Biribawa,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS RAISED for REVIEW

1. For the purpose of determining whether law is clearly established on a federal question, may the federal courts below limit their considerations to state court decisions while distinguishing federal court decisions on the basis of a "materially similar" standard in a non-diversity case?
2. Is it clearly established that the Fourth Amendment prohibits state law enforcement agents from threatening arrest and incarceration of a person resisting a warrantless, unconsented search of private dwelling premises?
3. Does the Takings Clause of the Fifth Amendment prohibit state agents from temporarily occupying private dwelling lands, for purposes of administering state regulations, without notice, hearing, or compensation to the inhabitant, while the inhabitant is being restrained?
4. Does the Equal Protection Clause of the Fourteenth Amendment prohibit state agents from employing a constructive classification as the basis for depriving someone of his fundamental rights?

PARTIES

All parties are named in the caption of the case.

CORPORATE DISCLOSURE STATEMENT

The parties to this case are individuals, and no corporate entity is named in any capacity.

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OPINIONS and ORDERS ENTERED in the CASE by the COURTS

The order of the Court of Appeals [Case No. 03-14011] affirming dismissal is designated "[DO NOT PUBLISH]" above the caption. A re-formatted reproduction of that order and opinion are included in the APPENDIX to this petition, pages A-I-1 through A-I-9.

The order of the District Court [Case No. 2:00-CV-506-FTM-29DNF] dismissing the petitioner's claims is not reported. A re-formatted reproduction of that order and opinion are included in the APPENDIX to this petition, pages A-II-1 through A-II-15.

The order of the Court of Appeals denying the petition for rehearing en banc is reproduced, re-formatted, in the APPENDIX to this petition, an un-numbered single page.

STATEMENT of BASIS for JURISDICTION

This petition is filed under Rule 10 (c) of the Rules of the Supreme Court.

On March 5, 2004, the United States Court of Appeals for the Eleventh Circuit issued an order affirming dismissal of the petitioner's claims by the United States District Court for the Middle District of Florida.

On March 23, 2004, petitioner filed a petition for rehearing en banc with the Eleventh Circuit.

On April 30, 2004, the Eleventh Circuit issued an order denying petitioner's motion for rehearing en banc.

On May 13, 2004, the order affirming dismissal was issued as mandate.

The Supreme Court has jurisdiction to review the order affirming dismissal on writ of certiorari by authority of 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, and REGULATIONS INVOLVED in the CASE

I. The Constitution for the United States of America;

the Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the the place to be searched and the persons or things to be seized.

the Fifth Amendment, in part:

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

the Fourteenth Amendment, Section 1, in part:

No State shall make or enforce any law which shall abridge the privileges or imunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

II. The Florida Constitution of 1968:

Article I, section 12:

The right of the people to be secure in their persons, houses, papers, and effects against ureasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons to be seized, the communications to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or

information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court.

III. The Florida Statutes (2000):

§581.031

The department [Department of Agriculture and Consumer Services] has the following powers and duties: ...
(15)(a) To inspect plants, plant products, or other things and substances that may be capable of disseminating or carrying plant pests, noxious weeds, or arthropods, and for this purpose shall have power to enter into or upon any place and to open any bundle, package, or other container containing, or thought to contain, such material, and to take possession of such material if determined by the department to pose a threat to the agricultural or public interests of this state.

§581.184(7)

Upon request of the department, the sheriff of each county in the state shall provide assistance in obtaining access to private property for the purpose of enforcing the provisions of this section. The sheriff shall be responsible for maintaining public order during the eradication process and protecting the safety of department employees, representatives, and agents charged with implementing and enforcing the provisions of this section. The department may reimburse the sheriff for the reasonable costs of implementing the provisions of this section.

IV. Florida Attorney General Opinion 84-32 (April 2, 1984)

SUMMARY

A municipal code inspector is without authority to enter onto any private, commercial or residential property to assure compliance with or to enforce the various technical codes of

the municipality or to conduct any administrative inspections or searches without the consent of the owner or the operator or occupant of such premises or without a duly issued search or administrative inspection warrant. The procurement and issuance of administrative inspection warrants is governed by the provisions of ss. 933.20 - 933.30, F.S., and as to those residences a search warrant or the prior consent and approval of the owner is required.

V. Florida Administrative Code Chapter 5B-58
5B-58.001 Citrus Canker Eradication
See APPENDIX, pp. A-III-1 through A-III-10.

STATEMENT OF THE CASE

On June 19, 2000, respondents Biribawa and Vasquez, acting as agents of the Florida Department of Agriculture and Consumer Services (DACS), entered onto the curtilage of Grimm's dwelling, without notice and without consent. Biribawa informed Grimm that she and Vasquez entered Grimm's premises for the purpose of finding and inspecting citrus trees possibly infected with canker.

Upon challenge by Grimm, Biribawa admitted to having no warrant. Vasquez had already commenced conducting a search and inspection of Grimm's curtilage lands. Grimm ordered Biribawa and Vasquez to leave the premises, and they immediately departed.

On June 20, 2000, Biribawa and Vasquez returned to Grimm's premises, accompanied by respondent Spell, an armed and uniformed deputy of the Collier County Sheriff. Stopped by a locked gate, Spell sounded the siren of his patrol car, alerting Grimm to the presence of the three.

Grimm confronted Spell, Biribawa, and Vasquez and demanded an explanation for their presence on the premises.

Spell responded that he had accompanied the DACS agents for the purpose of prohibiting Grimm from interfering in their search and inspection of Grimm's curtilage lands. Grimm asked Spell if he were in possession of a warrant authorizing the search and inspection. Spell stated that he had no warrant and that no warrant is required under Florida law.

Grimm informed Spell that a warrant is required by law for such entry without consent of the inhabitant. Spell responded by threatening to arrest and incarcerate Grimm if he refused to open the gate and allow a search and inspection of the curtilage lands.

Under protest, Grimm unlocked the gate and stepped aside. Spell, Biribawa, and Vasquez immediately passed through the gate and onto Grimm's curtilage lands. Biribawa and Vasquez conducted a search and inspection of the curtilage lands while Spell stood near to Grimm and kept his right hand near his firearm.

Upon Biribawa and Vasquez's return to the gate opening, Vasquez handed some DACS documents to Grimm and threatened that he would return within about 60 days. Grimm stated to Vasquez that no entry would be permitted if no warrant were presented upon Vasquez's return.

Spell, Biribawa, and Vasquez then departed Grimm's premises.

Grimm made written notice and demand of Biribawa, Vasquez, and Spell, for remedy of torts. Counsel for Biribawa, and Vasquez, responded in writing, refusing to comply with Grimm's demands. Spell did not respond to Grimm's demands.

On November 13, 2000, Grimm filed a complaint in the United States District Court for the Middle District of Florida pursuant to 28 U.S.C. §1331 and §1343.

The complaint was twice amended with leave of court.

The Second Amended Complaint consists of three Counts against six defendants. Count I alleges violations of the Fourth, Fifth, and Fourteenth Amendments under 42 U.S.C. §1983; Count II alleges conspiracy under 42 U.S.C §1985(3); and Count III alleges neglect to prevent wrong under 42 U.S.C. §1986.

The district court dismissed with prejudice the Second Amended Complaint, finding all defendants qualifiedly immune from Grimm's claims..

Pursuant to 28 U.S.C. §1291, Grimm appealed to the Eleventh Circuit, which affirmed dismissal of Counts II and III against all appellees, affirmed dismissal of Count I against three appellees, and vacated the dismissal of Count I against Spell, Vasquez, and Biribawa. The Eleventh Circuit remanded the remaining case to the district court, mandating that the district court make a finding as to whether a constitutional violation had occurred and, only if so, to decide whether, at times material, the remaining three appellees had fair warning that their actions violated clearly established.

After the parties submitted briefs on the question of the occurrence of a constitutional violation, the district court again dismissed with prejudice the remaining Count I as to the three remaining appellees, finding that a Fourth Amendment violation was alleged but the appellees were qualifiedly immune. The district court found that the appellees had no fair notice that their actions violated clearly established law.

Grimm appealed again to the Eleventh Circuit which affirmed the district court's order.

Grimm petitioned for rehearing en banc. The Eleventh Circuit denied the petition

ARGUMENT

In the case under petition, the United States Court of Appeals for the Eleventh Circuit affirmed the dismissal with prejudice of the petitioner's claims by the United States District Court for the Middle District of Florida.

The stated grounds for the dismissal of the Fourth Amendment claims, found sufficiently pleaded in the petitioner's complaint, is qualified immunity of the respondents from petitioner's claims.

The stated grounds for dismissal of the Fifth and Fourteenth Amendment claims is insufficiency of pleading in the petitioner's complaint.

The District Court found, and the Eleventh Circuit affirmed, that respondents reasonably believed that conducting a warrantless, unconsented search and seizure of the fenced curtilage of petitioner's private dwelling, while restraining the petitioner under armed threat of arrest and incarceration, was authorized by state statutes.

I. DECISIONS OF THE SUPREME COURT CLEARLY ESTABLISH THAT THE MATERIAL ACTS OF THE RESPONDENTS ARE UNLAWFUL.

The essential predicate to considering a party eligible for qualified immunity is whether that party acted materially within his discretionary authority [***Harlow v. Fitzgerald***, *457 U.S. 800, 817*]. The District Court finds the respondents eligible [**A-II-5**], and the Eleventh Circuit affirms [A-I-7]. The Courts below base their conclusions on the record, which shows that respondents, in motions for dismissal and in answer briefs in appeals, that they rely on ***Fla. Stat. §581.031(15)(a)*** for authority to conduct an inspection and on ***Fla. Stat. §581.184(7)*** for authority to have the sheriff's assistance in gaining access. [see p.vii, above].

As the Eleventh Circuit has noted [**A-I-4**], ***Fla. Stat. §581.031(15)(a)*** [see above] has no language stating or implying that agricultural inspections may be conducted without warrants or consent of the inhabitants. Nevertheless, the Eleventh Circuit finds it reasonable for respondents to have assumed that there is an exception to the ***Fourth Amendment*** implicit therein [**A-I-9**]. The petitioner has argued, unsuccessfully, that this section does nothing more than provide statutory grounds for agricultural inspectors to make application for a warrant where consent is denied. In that vein, petitioner has argued that ***§581.184(7)*** provides statutory means by which the sheriff may assist agricultural agents in lawfully gaining access to private lands, which would, as a matter of Florida law [***Fla. Stat. §933.21*** and ***Fla. Stat.§30.15(b)***[1]], require a search warrant and service by a sheriff or his deputy.

Only sheriffs and their deputies have authority to serve warrants, so it is only reasonable that the assistance authorized in ***§581.184(7)*** be lawful assistance not contrary to

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1. "An inspection warrant shall be issued only upon cause, supported by affidavit, particularly describing the place, dwelling, structure, or premises to be inspected and the purpose for which the inspection is to be made. In addition, the affidavit shall contain a statement that consent to inspect has been sought and refused or a statement setting forth facts or circumstances reasonably justifying the failure to seek such consent Owner-occupied family residences are exempt from the provisions of this act." ***Fla. Stat. §933.21*** (2000)

"Sheriffs, in their respective counties, in person or by deputy, shall: ... (b) Execute other such writs, processes, warrants, and other papers directed to them, as may come to their hands to be executed in their counties." ***Fla. Stat. §30.15(b)*** (2000)

other statutes or to the state or federal constitutions.

The Florida legislature had provided lawful, constitutional means for state agents, operating under lawful authority, to gain entry to the petitioner's premises, if they could meet the legal standards for acquiring a valid warrant. The respondents did not bother to use lawful means, for whatever reason. The means they chose were unlawful, and that unlawfulness was clearly established at times material.

Addressing the question whether administrative inspections are exempt from the ***Fourth Amendment***, the Supreme Court has found that, where no rules governing inspection procedures are in place, "*the Fourth Amendment and its various restrictive rules apply.*" [***Colonnade Catering Corp. v. United States,*** *397 U.S. 72, 77*]

It is, therefore, not within the discretionary authority of agricultural agents and deputies sheriff to jointly conduct an unconsented, warrantless search of the petitioner's curtilage under armed threat of arrest and incarceration. Accordingly, the respondents cannot be eligible for qualified immunity from the petitioner's claims.

As to the discretionary authority of the respondents agricultural agents, their activities authorized under the Citrus Canker Eradication Program [CCEP] are regulated under the ***Florida Administrative Code, §5B-58.001*** [see **A-III-1**, et.seq.], titled Citrus Canker Eradication [hereinafter, the CODE].

The CODE prescribes the procedures to be followed in enforcing the CCEP. It expressly limits entry of agents to properties "*where citrus canker is known to exist or ... which have been exposed to citrus canker.*" **[A-III-2, ¶(2)]** Agents are not authorized by the CODE to enter any property not known to contain or be exposed to citrus canker. Respondents searched the petitioner's property, trying to determine whether it were containing or exposed to citrus

canker, but they did so in an unlawful way. The CODE further provides that properties containing or exposed to citrus canker be quarantined, and the boundaries of the quarantine area be determined by "*risk assessment*" procedures; after which certain "*control procedures*" are to be implemented. If the property is not quarantined, there is no authority to conduct risk assessment or control procedures. The control procedure adopted by the CCEP is destruction of all citrus horticulture within a 1900-foot radius of any infected tree [see ***Fla. Dep't of Agric. & Consumer Servs. v Haire***, *836 So.2d 1040, 1043-44*]. The CODE requires certain notifications and documentation to precede any control procedures, i.e. destruction of citrus trees. It is during the destruction process that the sheriff's assistance may be provided, according to ***Fla. Stat. §581.184(7)***; that section of the statute pertaining to destruction and decontamination procedures, only. There is no statutory or regulatory authority for sheriffs or their deputies to assist CCEP agents during any other phase of the program.

Accordingly, respondents agricultural agents had no authority to enter the petitioner's premises, because they could not know whether it contained or had been exposed to citrus canker and because the petitioner's property was not quarantined. Respondents knew, or should have known, that the DACS's published quarantine maps did not include the petitioner's property and, therefore, that it had not been quarantined. There had been no notifications or documentations made, so the respondents agricultural agents could not have been implementing control procedures, of which destruction is a part. Accordingly, there was no lawful authority to engage respondent deputy sheriff and no authority for the deputy sheriff to assist the agricultural agents.

Because there was no lawful authority for

respondents' material acts, they cannot have been acting within their discretionary authority, and they cannot be eligible for qualified immunity, notwithstanding the Eleventh Circuit's holding to the contrary.

Alternatively, putting aside, for the sake of argument, their lack of discretionary authority, the respondents had fair warning/fair notice that their material acts violated clearly established law found in decisions of the Supreme Court.

The first warning that respondents received was in the statutory oath that all state employees are required to take and which is a matter of public record: "*I ... do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida.*" The ***Florida Constitution, Article I, §12,*** expressly adopts the ***Fourth Amendment*** of the federal Constitution and the decisions of the Supreme Court of the United States interpreting it [see pp. vi-vii, above]. All Supreme Court decisions interpreting the ***Fourth Amendment*** are, therefore, part of the common law of Florida. It is noteworthy that the oath makes no reference to statutes or administrative regulations.

In April of 1984, the Florida Attorney General advised the executive branch that private family dwelling premises could not be entered without either the inhabitant's consent or a duly-issued warrant [see pp. vii-viii, above]. That opinion cited ***See v. City of Seattle,*** *387 U.S. 541*; ***Colonnade Catering Corp. v. United States,*** *397 U.S. 72*; and ***Michigan v. Tyler,*** *436 U.S. 499*, (among others) which cite this Court's ***Camara*** decision [following below].

The ***Camara*** case concerned warrantless entries by municipal inspectors enforcing the City's health and safety codes. Resisters of such searches were subject to arrest. The Supreme Court held that "*one governing principle,*

justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant." [*387 U.S. at 529-30*]

The ***Camara*** court further stated: "*When the right of privacy must reasonably yield to the right to search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.*" [citing ***Johnson v. United States***, *333 U.S. 10, 14*]

The District Court found that the facts of this case are not "*sufficiently similar*" to those in ***Camara v. Municipal Court of the City and County of San Francisco***, *387 U.S. 583* (1967), for the holdings of that case to "*make it clear to a reasonable officer that his conduct was unlawful in conducting a warrantless search*" of the petitioner's curtilage [see A-II-13]. Crafty rewording notwithstanding, it is clear that the District Court employed the same "*materially similar*" standard which this Court rejected in ***Hope v. Pelzer,*** *536 U.S. 730* (reversing a decision of the Eleventh Circuit). Though affirming the District Court's decision, the Eleventh Circuit avoided any reference to the ***Camara*** case. The Eleventh Circuit cited the ***Hope*** decision, but did not refer to the rejection of its "*materially similar*" standard.

Both the District Court and the Eleventh Circuit cite a later state appellate court case[2] involving the same state administrative program (Citrus Canker Eradication Program), wherein the court held that unconsented entries made under that administrative program require duly-issued warrants [**A-I-7; A-II-6, A-II-13, n. 6**]. The Courts below in this case

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2. See ***Florida Dep't of Agric. & Consumer Servs. v Haire,*** *836 So.2d 1040* (2003). The petitioner's case arose June 19, 2000.

find that the ***Camara*** decision, handed down in 1967, did not did not clearly establish that a warrant is required in these circumstances because no state appellate court had so held. But this is not a diversity case; the Erie doctrine does not apply [***Erie R.R. Co. v. Tompkins***, *304 U.S. 64*]. State law does not control resolution of issues governed by federal statute [***Budinich v. Becton Dickinson And Co.***, *486 U.S. 196*]. Federal questions are determined by federal law [***28 U.S.C. 1652***]. This case arose out of violations of the federal constitution and was brought under federal rights of action.

The state appellate ***Haire*** court relied on the holdings of the ***Camara*** decision, in finding the requirement for warrants, and on ***United States v. Dunn***, *480 U.S. 294* (1987), in holding that the ***Fourth Amendment*** protections extend to curtilage. The Courts below in this case concur.

The Eleventh Circuit finds that, because the state appellate court's ***Haire*** decision was untimely, the respondents "*did not have fair warning to notify them that their actions were unlawful.*"

The Eleventh Circuit further stated:

> *Therefore, we conclude that a reasonable official would not have understood that the statutorily authorized citrus canker inspection of private property violated a constitutional right.* [see **A-I-9**.]

Though the Eleventh Circuit states that "*the district court did consider all constitutional law, both from federal and state courts ...*" [see **A-I-9, n. 5**], the record refutes that statement.

In its ***Hope*** decision [above], the Supreme Court reversed a decision of the Eleventh Circuit, finding that:

> *Our opinion in **Lanier** thus makes clear that officials can still be on notice that their conduct violates clearly established law even in novel factual circumstances. Indeed, in **Lanier**, we expressly*

> *rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with "materially similar" facts.* [*at p. 741*]

The ***Hope*** decision was handed down June 27, 2002. The ***Lanier*** decision [***United States v. Lanier***, *520 U.S. 259*] was handed down March 31, 1997. The District Court dismissed the petitioner's complaint on July 3, 2003, and the Eleventh Circuit affirmed on March 5, 2004.

The Courts below in this case had every reason to follow ***Hope*** and ***Lanier***. That they failed or neglected to do so places them in conflict with relevant decisions of the Supreme Court and establishes cause for the Supreme Court to issue a writ of certiorari to the Eleventh Circuit in this case.

III. RESPONDENTS' TEMPORARY PHYSICAL OCCUPATION OF PETITIONER'S PREMISES TOGETHER WITH THE STATED THREAT OF REPEATED OCCURRENCE VIOLATE THE TAKINGS CLAUSE OF THE FIFTH AMENDMENT.

The District Court holds that the petitioner has not stated a "takings" claim under the ***Fifth Amendment***, either physical or regulatory [**A-II-8,9**]. The Eleventh Circuit affirms [**A-I-7&9**]. This holding is in conflict with decisions of the Supreme Court. The circumstances of this case are apparently novel in that the taking of the petitioner's property is both physical and administrative [Cf.: **A-II-8** and **A-I-7**]. As the ***Hope*** court found, however, that novelty does not exempt those circumstances from the effects of established legal principles [***Hope*** at *741*, citing ***Lanier***]. Respondents

assumed authority under administrative regulations to enter the petitioner's premises, without notice or consent, and to do so whenever they deemed appropriate.

The Supreme Court has held that a show of authority by a law enforcement officer in restraint of a person's liberty is a "seizure", as the Fourth Amendment comprehend that term [***Terry v. Ohio**, 329 U.S. 1, 19, n. 16*]. The Eleventh Circuit acknowledged this holding in ***Courson v. McMillian**, 939 F.2d 1479, 1488*. Thus, when the respondent deputy sheriff made a show of authority and threatened to arrest and incarcerate the petitioner, the deputy "seized" the petitioner. In this state of seizure, the petitioner was deprived of his liberty and any and all use of his property. While the petitioner was seized by the respondent deputy sheriff, the respondents agricultural agents conducted a search of the petitioner's property. All respondents acted materially under color of law. The Courts below find that the petitioner alleged a ***Fourth Amendment*** violation, but that no taking was alleged [see above].

The Supreme Court has held that "*the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'*" [***Loretto v. Teleprompter Manhattan CATV Corp.**, 458 U.S. 419, 433*] Because the petitioner is deprived of his right to exclude the respondents from his premises, he is deprived of his property rights, and the deprivation was effected without due process of law, in violation of the ***Fourteenth Amendment***.

In its decision in ***Nollan v. California Coastal Comm'n.**, 483 U.S. 825, 834,* the Supreme Court held that:

> *We think that a "permanent physical occupation" has occurred ... where individuals are given a permanent and continuous right to pass to and fro, so that the*

real property may be continuously traversed, even though no particular individual is permitted to station himself permanently on the premises.

The ***Nollan*** case involved the uncompensated assertion of a permanent easement across private property as a condition of permitting improvements to the property.

Though the respondents in the case under petition stated intent to return to the petitioner's property within about sixty days of the original event, it is clear that, if their stated interpretation of the law is correct, then they could enter at any time under the auspices of the CCEP, and the petitioner would have no right to exclude them, or any other CCEP agents and their deputy sheriff escorts.

The temporality of the administrative-physical taking of the petitioner's property does not limit the application of the ***Fifth Amendment's*** Takings Clause or of the ***Fourteenth Amendment's*** Due Process Clause. "*'Temporary' regulatory takings which ... deny a landowner all use of his property, are not different in kind from permanent takings for which the constitution clearly requires compensation.*" [***First Lutheran Church v. Los Angeles County***, *482 U.S. 304, 305*]. Restraining the petitioner during the search of his property deprived him of his liberty, thus obstructing his use of that property for the time that the search took place. Because there was no standard for what may be construed as "interference" [see ***Colonnade***, above, p. 3], the respondent deputy presumed authority to arbitrarily arrest and incarcerate the petitioner for any use that he might attempt to make of his property during the pendency of the administrative search.

Under Florida law[3], rights are property. The ***Florida***

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3. "Property means anything of value and includes: ... (b) tangible or intangible personal property, including rights, ..." ***Fla.Stat. §812.012(3)*** (2000)

Constitution, Article I,§9 provides that "*No person shall be deprived of life, liberty, or property without due process of law ...* ". Accordingly, any deprivation of the petitioner's rights is, in effect, a taking of property without due process or just compensation. The Supreme Court has held that "*After* ***Mahon*** [**Pennsylvania Coal Co. v. Mahon**, 260 U.S. 393], *neither a physical taking nor a public use has ever been a necessary component of a 'regulatory taking'* " [***Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency***, *535 U.S. 302*]. Thus, a regulatory taking is possible even without a physical occupation or a public use. In the case under petition, there was physical occupation of the petitioner's real property, done under color of regulatory authority, in addition to the deprivation of rights, which is effectively a taking of intangible property.

The taking of intangible property is also prohibited by the federal Constitution. [***Ruckelshaus v. Monsanto Co.***, *467 U.S. 986, 987*].

Even though the taking in the case under petition is novel, it is a taking under the legal principles pronounced by this Court.

III. THE MATERIAL ACTS OF THE RESPONDENTS VIOLATE THE EQUAL PROTECTIONS CLAUSE.

The law under which color the respondents materially acted is administrative, exercised under the state's presumptive executive police powers to protect the public health, safety, welfare, and morals. It is not in exercise of the state's judicial authority to prosecute crimes.

The respondents essentially presumed to classify the

petitioner's property as "quarantined" in order to exercise colorable authority to administratively enter and search the property for citrus canker. This may be regarded as a constructive classification, inasmuch as it is prerequisite to the respondents' entry onto the petitioner's property, and the actual entry necessitates the classification, whether the classification were made actually or constructively. Based on this classification, the respondents treated the petitioner as if he were not entitiled to the same protections afforded under the Fourth Amendment to all persons.

Finding it "reasonable" that the respondents have relied on ***Fla. Stat. §581.031(15)(a)*** as authorizing a warrantless search [**A-I-9**], the Eleventh Circuit has, in effect, endorsed the "quarantine" classification of the petitioner's property. Implicitly, then, the adoption in the ***Florida Constitution, Article I, §12*** [see pp. vi-vii, above] of Supreme Court decisions on search and seizure, and ***Fla. Stat. §933.21*** [see p. 2, n. 1], may "reasonably" be ignored in state agents' exercise of colorable administrative authority. The Eleventh Circuit acknowledges that the ***Haire*** decision [**A-I-7,8**] voids the classification distinction that it found "reasonable" in this case, but notes the untimeliness. In distinguishing the ***Camara*** case from the case under petition, based on its "special need" analysis [**A-II-13, 14**], the District Court has validated the "quarantined" classification as justifying respondents' material acts, disregarding that such classification was asumed without legal authority.

The District Court cites ***Nordlinger v. Hahn***, *505 U.S. 1,* [**A-II-9,10**] to note that the ***Equal Protection Clause*** does not prohibit classifications, but prevents different treatments of people who are alike "in all relevant respects" [*505 U.S. at 11*, citing ***F.S. Royster Guano Co. v. Virginia***,

253 U.S. 412, 415]. The ***Nordlinger*** court found, following ***Cleburne v. Cleburne Living Center, Inc.***, *473 U.S. 432, and* ***New Orleans v. Dukes***, *427 U.S. 297*, that "*heightened review*" of a classification is due if it "*jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic*". The Courts below in this case find that a ***Fourth Amendment*** violation is sufficiently alleged [**A-I-7; A-II-8**], so, clearly, exercise of the petitioner's fundamental right was jeopardized. As to whether the "quarantine" classification is inherently suspect, the petitioner alleges that his property is outside the area under quarantine [**A-I-3; A-II-3**]; and the Courts below accept well-pleaded factual allegations as true for purposes of considering respondents' motions to dismiss [**A-I-3, n. 2; A-II-2**].

Accordingly, the petitioner hereby argues that heightened review of the constructive classification of his lands, under color of administrative authority, is due.

VI. CONCLUSION

For the reasons above, the petitioner prays for the Supreme Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit on the questions raised above for this case.

By the Petitioner, *Pro Se*
Joseph Lee Grimm

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APPENDIX

DOCUMENT	PAGE
ORDER and OPINION of the United States Court of Appeals for the Eleventh Circuit to AFFIRM DISMISSAL	A-I-1
ORDER and Opinion of the United States District Court for the Middle District of Florida to DISMISS with PREJUDICE	A-II-1
ORDER of the United States Court of Appeals for the Eleventh Circuit to DENY PETITION for REHEARING EN BANC	no #
FLORIDA ADMINISTRATIVE CODE, SECTION 5B-58.001	A-III-1

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14011
Non-Argument Calendar

[FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
MAR 05 2004 THOMAS K. KAHN CLERK]

D.C. DOCKET No. 00-00506-CV-FTM-29-DNF

JOSEPH LEE GRIMM,

Plantiff-Appellant,

versus

CHARLES S. SPELL,
a.k.a. Steve Spell,
PETER VASQUEZ, et.al.,

Defendants-Appellees,

JOHN C. MAUSEN,
SCOTT STAMETS,

Defendants.

Appeal from the United States District Court
for the Mddle District of Florida

(March 5, 2004)

Before BLACK, BARKETT and HULL, Circuit Judges

PER CURIAM:

Joseph Lee Grimm appeals pro se from the court's Rule 12(b)(6) dismissal of his second amended complaint brought under 42 U.S.C. §1983. See Fed. R. Civ. Pro. 12(b)(6). Grimm's second amended complaint alleged that defendants Peter Vasquez and Prosscovia Biribawa, agents of the Florida Department of Agriculture and Consumer Services ("DACS"), and defendant Charles Spell, a Deputy Sheriff of Collier County, entered his property to inspect his citrus trees for canker and thereby violated his Fourth, Fifth, and Fourteenth Amendment rights.[1] The district court found that (1) Grimm's second amended complaint stated a constitutional violation under the Fourth Amendment, but not under the Fifth and Fourteenth Amendments, and (2) that defendants Vasquez, Biribawa, and Spell were entitled to immunity on Grimm's Fourth Amendment claim.

I. BACKGROUND

A. FACTS

Grimm resides on a less-than-five acre parcel of land

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1. Citrus canker is a disease that is caused by a bacterial organism that is very harmful to citrus plants and affects the marketability of citrus fruit. For a summary of the history of the citrus canker andFlorida's eradication efforts, see Florida Dep't of Agric. & Consumer Servs. v. Haire, 836 So.2d 1040, 1043-44 (Fla. Dist Ct. App. 2003); Florida Dep't of Agric. & Consumer Servs. v. City of Pompano Beach, 792 So.2d 539, 541-42 (Fla. Dist Ct. App. 2001); State of Florida v. Sun Gardens Citrus, LLP, 780 So.2d 922, 924 (Fla. Dist. Ct. App. 2001).

in Collier County, Florida.[2] Grimm's parcel is outside of any agricultural quarantine area, and no regulated agricultural activities take place there.

On June 19, 2000, defendants Vasquez and Biribawa, DACS agents, entered onto Grimm's premises. Vasquez commenced "handling and examining folliage of [Grimm's] horticulture." Grimm demanded that the defendants produce a warrant authorizing their entry into his premses. When Biribawa answered that they had no warrant, Grimm ordered the two defendants to leave his premises. Vasquez and Biribawa complied.

The next day, June 20, 2000, defendants Vasquez and Biribawa re-entered Grimm's property, but this time they were escorted by defendant Spell, a deputy with the Collier County Sheriff's Department. According to Grimm, Deputy Spell arrived in an official vehicle, brandishing a weapon. The three defendants proceeded as far as a locked gate on Grimm's property.

Grimm heard Spell's police car siren and, upon seeing the defendants, demanded an explanation for their entry onto his property. Spell asserted that the defendants had authority, under Florida Statute §581.031, to perform a warrantless entry onto Grimm's property to inspect for citrus canker and that he was there to escort them to prevent Grimm from interfering with them. Grimm asked to see a warrant, but

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2. In reviewing Grimm's complaint , "we accept all well-pleaded factual allegations as true, and construe the facts in the light most favorable to the plaintiff." Maggio v. Sipple, 211 F.3d 1346, 1350 (11th Cir. 2000).

Spell replied that no warrant was required under this Florida statute.

It is true that the face of Florida Statute §581.031 allows inspections and does not mention a warrant, stating that DACS has the power and duty "[t]o inspect plants, plant products, or other things and substances that may be capable of disseminating or carrying plant pests, noxious weeds, or arthropods, and for this purpose shall have power to enter into or upon any place." Fla. Stat. 581.031(15)(a)(2000). Additionally, under Florida Statute 581.184(9), "[u]pon request of [DACS], the sheriff ... shall provide assistance in obtaining access to private property for the purpose of enforcing the provisions of this section" and also "shall be responsible for maintaining public order during the eradication process and protecting the safety of [DACS] employees, representatives, and agents charged with implementing and enforcing the provisions of this section." Id.

Grimm then attempted to resist the defendants' entry onto his curtilage and Deputy Spell threatened to arrest and incarcerate Grimm for continued failure to cooperate. Grimm then unlocked the gate and allowed the defendants to proceed with their inspection. When the defendants concluded their inspection, they notified Grimm that they would return within sixty days to conduct further inspection.

B. Procedural History

This case is before this Court for the second time. In the prior appeal, this Court noted that the district court assumed, without deciding, that Grimm's second amended complaint alleged a constitution violation, but held any such violation was not clearly established. In the prior appeal, this Court concluded that, in light of Saucier v. Katz, 533 U.S.

194, 201, 121 S.Ct. 2151, 2156 (2000), the district court erred in not first deciding whether Grimm's allegations against Vazquez, Biribawa, and Spell established a constitutional violation. Accordingly, we vacated the judgement in favor of defendants Vasques, Biribawa, and Spell on Grimm's claims under the Fourth, Fifth, and Fourteenth Amendments[3]. We instructed the district court to consider, on remand and in the first instance, whether a constitutional violation occurred, and only then, if a violation of a constitutional right is shown, whether the constitutional right was clearly established.

On remand, the district court held that Grimm's allegations, if proven, would not establish a Fifth or Fourteenth Amendment violation, but would establish a constitutional violation under the Fourth Amendment. The district court then concluded that the defendants had not violated clearly established constitutional law, and that the defendants were therefore entitled to qualified immunity for any Fourth Amendment violations. Grimm timely appealed

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3. Grimm's second amended complaint contained three Counts and named not only the current defendants, Vasquez, Biribawa, and Spell, but also their supervisors, John C. Mausen, Scott Stamets, and Grabriela A. Avilez. In the prior appeal, this Court affirmed the dismissal of Counts II and III as to all defendants and the dismissal of Count I as to Mausen, Stamets, and Avilez. Thus, only Count I of the second amended complaint, as it applies to defendants Spell, Vasquez, and Biribawa, is at issue. Grimm's Fourth, Fifth, and Fourteenth Amendment claims are all in Count I.

again.[4]

II. DISCUSSION

Qualified immunity protects government officials sued in their individual capacities if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). "[T]o receive qualified immunity, the public official must first prove that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. If the defendant was not acting within the scope of his discretionary authority, he is ineligible for the benefit of qualified immunity." Lee v. Ferraro, 24 F.3d 1188, 1194 (11th Cir. 2002) (internal quotation marks and citations omitted). "Once the defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate." Id.

The Supreme Court has set forth a two-part test for qualified immunity. "The threshold inquiry a court must take in a qualified immunity analysis is whether [the] plaintiff's allegations, if true, establish a constitutional violation." Hope v. Pelzer, 536 U.S. 730, 736, 122 S.Ct. 2508, 2513 (2002) (citing Saucier, 533 U.S. at 201, 121 S.Ct.at 2156). If a constitutinal right would have been violated under the plaintiff's version of the facts, "the next, sequential step is to ask whether the right was clearly established." Saucier, 533 U.S. at 210, 121 S.Ct. at 2156

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4. We review de novo a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. Kyle K. v Chapman, 208 F.3d 940, 942 (11th Cir. 2000).

On this record, it is clear that the defendants were acting within the scope of their discretionary authority when they inspected Grimm's property. Thus, we examine whether Grimm's allegations state a claim for violation of his constitutional rights under the Fourth, Fifth, and Fourteenth Amendments. As to Grimm's §1983 claims under the Fifth and Fourteenth Amendments, we agree that Grimm's allegations, even if proven, would not establish constitutional violations for the reasons outlined in the district court's order. Thus, we discuss only Grimm's claims under the Fourth Amendment.

A. Constitutional Violation

After review, we conclude (1) that Grimm's allegations in his second amended complaint state a constitutional violation under the Fourth Amendment, but (2) that the defendants are entitled to qualified immunity because it was not clearly established as of June 20, 2000, that it was unlawful for the defendants to enter Grimm's property and inspect exterior plant material for citrus canker.

As mentioned earlier, at the time of the events in this case, Florida statutes allowed defendants Vasquez and Biribawa, DACS agent, to enter Grimm's property and inspect for citrus canker. See Fla. Stat. 581.184(9).

However, in 2003, a Florida appeals court, in Florida Det't of Agric. & Consumer Servs. v. Haire, found that a warrant was required for administrative search of a curtilage for citrus canker. 836 So.2d 1040, 1057 (Fla. Dist. Ct. App. 2003). There, DACS argued that §581.031 did not violate the Fourth Amendment because the intrusion to inspect for citrus canker is so de minimus as to be reasonable and not require a warrant, and, alternatively, because the warrantless

inspection for citrus canker falls within the exigent circumstances exception to any warrant requirement. Id. at 1057-58. The Florida appeals court concluded that DACS is not excused from obtaining a warrant to search constitutionally protected property because the type of emergency or exigent circumstances necessary to dispense with the warrant requirement is not present with regard to citrus canker inspections. Id. at 1057-58.

For the reasons provided in the Haire opinion, we conclude that the Fourth Amendment requires that DACS agents obtain a warrant prior to conducting citrus canker inspections, and thus, that Grimm stated a constitutional violation under the Fourth Amendment.

B. Fourth Amendment Violation Not Clearly Established

The Supreme Court has stated that "the salient question ... is whether the state of the law ... gave [the government officials] fair warning" that their actions were unconstitutional. Hope, 536 U.S. at 741, 122 S.Ct. at 2516 (emphasis added); see Marsh v. Butler County, 268 F.3d 1014, 1031 (11th Cir. 2001)(stating that "fair and clear notice to government officials is the cornerstone of qualified immunity"). "For a constitutional right to be clearly established, its contours 'must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" Hope, 536 U.S. at 739, 122 S.Ct. at 2515 (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034 3039 (1978)).

As of June 20, 2000, the Florida statutes appeared to authorize the defendants' actions and no Florida appellate court had held that a search warrant was needed under the

circumstances at issue in this case.[5] The fact that courts have since addressed this issue is irrelevant to determining whether qualified immunity applied to the defendants' actions at that time in 2000. Thus, the defendants did not have fair warning to notify them that their actions were unlawful.

Therefore, we conclude that a reasonable official would not have understood that the statutorily authorized citrus canker inspection of private property violated a constitutional right. Hence, Vasquez, Biribawa, and Spell are entitled to qualified immunity because their actions occurred in 2000.

III. CONCLUSION

The district court did not err in finding that Grimm's second amended complaint states a viable Fourth Amendment claim, but that defendants Vasquez, Biribawa, and Spell were entitled to qualified immunity on Grimm's Fourth Amendment claim. In addition, the district court did not err in finding that the allegations of Grimm's second amendment complaint, even if proven, did not establish a violation of the Fifth and Fourteenth Amendments. Accordingly, we affirm.

AFFIRMED

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5. In his brief on appeal, Grimm also argues that the district court erred by relying strictly on state law in determining that there was no clearly established law. However, as the defendants Vasquez and Biribawa's brief points out, the district court did consider all constitutional law, both from federal and state courts, in analyzing whether a Fourth Amendment violation was clearly established as of June 20, 2000.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[FILED 2003 JUL -3 AM 10:57
CLERK OF DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT MYERS DIVISION]

JOSEPH LEE GRIMM,
Plaintiff,

vs. Case No. 2:00-cv-506-FTM-29 DNF

CHARLES S. SPELL,
PETER VASQUEZ, and
PROSSCOVIA BIRIBAWA,
Defendants.

ORDER

This matter comes before the Court on remand from the Eleventh Circuit Court of Appeals, issued as a mandate April 4, 2003, to consider whether the plaintiff's allegations under 42 U.S.C. §1983 against defendants Peter Vasquez, Prosscovia Biribawa, and Charles S. Spell, if proven, would establish a constitutional violation and, if so, whether that constitutional right was clearly established at the time of the events in question. (Doc. #86). On April 9, 2003, the Court ordered each of the parties to file a memorandum of law addressing the issues on remand (Doc. #87), which the parties have done (Docs #88, #89, #90).

I.

The issues to be addressed arise within the context of the defendants' Motions to Dismiss the Second Amended Complaint (Docs. #65 66) and the plaintiff's opposition to those motions (Docs. #70, #71). In deciding a motion to dismiss, the Court must accept all factual allegations in a complaint as true and take them in the light most favorable to the plaintiff. Christopher v. Harbury, 536 U.S. 403, 406 (2002). A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted); Marsh v. Butler County, Alabama, 268 F.3d 1014, 1022 (11th Cir. 2001)(en banc). To satisfy the pleading requirements of Fed. R. Civ. P. 8, a complaint must simply give the defendants fair notice of what the plaintiff's claim is and the grounds upon which it rests. Schwierkiewicz v. Sorema N.A., 534 U.S. 506 (2002). However, the Eleventh Circuit imposes "heightened pleading requirements for civil rights cases, especially those involving qualified immunity." Cottone v. Jenne, 326 F.3d 1352, 1362 n. 7 (11th Cir. 2003)(citation omitted). Additionally, the pleadings of a *pro se* litigant are held to a less stringent standard than those drafted by an attorney, and therefore must be liberally construed. Trawinski v. United Techs., 131 F.3d 1295, 1297 (11th Cir. 2002). Dismissal is warranted under Fed. R. Civ. P. 12(b)(6) if, assuming the truth of the factual allegations of plaintiff's complaint, there is a dispositive legal issue which precludes relief. Neitzke v. Williams, 490 U.S. 319, 326 (1989); Brown v. Crawford County, Ga., 960 F.2d 1002, 1009-10 (11th Cir. 1992).

II.

The Court summarized the material facts alleged in the Second Amended Complaint (Doc. #60) in its original order of dismissal, but will repeat them here to the extent they are relevant to the issues on remand. Joseph Lee Grimm (plaintiff or Grimm) lives on a less-than-five-acre parcel of land in Collier County, Florida on which no regulated agricultural activities take place and which is outside of any agricultural quarantine area. The parcel contains a dwelling which is fenced in with a locked gate and visually obstructed from the nearest road by "an expanse of foliage approximately 300 feet in depth, preserved by plaintiff." On June 19, 2000, defendants Peter Vasquez (Vasquez) and Prosscovia Biribawa (Biribawa), in the course of their duties as agents of the State of Florida, entered upon plaintiff's property without prior notice or consent. Vasquez proceeded to "handle and examine foliage of plaintiff's horticulture while Biribawa approached plaintiff." When plaintiff asked to see a warrant authorizing entry onto his property, Biribawa responded that they did not have a warrant. Plaintiff then ordered Vasquez and Biribawa to leave the premises, and they left immediately.

On June 20, 2000, Vasquez and Biribawa re-entered plaintiff's property, escorted by defendant Charles S. Spell (Spell), a deputy with the Collier County Sheriff's Department. Deputy Spell was driving a marked Sheriff's Department vehicle and wearing a uniform with nametag and badge, and was "brandishing" a firearm. Vasquez, Biribawa, ans Spell proceeded to a locked gate on plaintiff's property, where they were confronted by the plaintiff. Plaintiff demanded an explanation for their entry upon his lands. Deputy Spell explained that he entered onto the promises pursuant to Florida Statutes §581.031 (authorizing

warrantless entry onto lands for inspection in connection withcitrus canker) to escort Vasquez and Biribawa onto the land
and prevent plaintiff from interfering with their inspection of the land. Plaintiff demanded production of a warrant authorizing entry onto the land, and Deputy Spell stated that no warrant was required under Florida statute. Plaintiff disagreed, and stated that the officers were require by law to obtain a valid warrant to enter lands over the objections of the inhabitants. Deputy Spell then threatened to arrest and incarcerate plaintiff if he refused to admit the agents beyond the locked gate in order to inspect the lands. Plaintiff orally protested, and demanded identification documents from all three. Vasquez, Biribawa, and Spell each produced identification. Plaintiff reluctantly unlocked the gate, stepped aside, and allowed Vasquez and Biribawa to enter. Vasquez and Biribawa then proceeded with the inspection of the lands, after which Vasquez handed papers to plaintiff and said he would return in 60 days for an additional inspection of the land. Plaintiff told the agent they would be denied entry unless they had a valid warrant. Vasquez, Biribawa, and Spell then left plaintiff's property.

III.

Plaintiff sued Vasquez, Biribawa, and Spell in their individual capacities alleging, pursuant to 42 U.S.C. §1983 that the defendants violated his rights under the Fourth Fifth,

and Fourteenth Amendments to the United States Constitution.[1] All defendants raise the defense of qualified immunity in their motions to dismiss.

To be eligible for qualified immunity, defendants must first prove each was acting within the scope of his discretionary authority when the allegedly wrongful act occurred. Wood v. Kesler, 323 F3d 872, 877 (11th Cir. 2003). It is clear from the allegations in the Second Amended Complaint that each individual was acting within the scop of his discretionary authority during the events at issue. As a result, the burden shifts to the plaintiff to show that qualified immunity is not appropriate. Id. at 877.

The Court conducts a two-part inquiry to determine whether qualified immunity is appropriate: First, the Court determines whether the facts as alleged in the complaint, viewed in a light most favorable to plaintiff, show that the government officials' conduct violated a constitutional right. Dahl v. Holley, 312 F.3d 1228, 1233 (11th Cir. 2002), citing Hope v. Pelzer, 536 U.S. 730, 735 (2002) and Saucier v. Katz, 533 U.S. 194, 201 (2002). If no constitutional violation is established, there is no need to go further and the officials prevail. Chavez v. Martinez, 123 S.Ct. 1994, 2000 (2003); Dahl, 312 F3d at 1233.

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1. The Second Amended Complaint contained three counts and named Vasquez, Biribawa, Spell and their supervisors, John C. Mausen, Scott Stamets, and Grabriela A. Avilez. (Doc. #60). The Eleventh Circuit affirmed the dismissal of Counts II and III as to all defendants and the dismissal of Count I as to Mausen, Stamets and Avilez. (Doc. #86). Thus, only Count I of the Second Amended Complaint, as it applies to Spell, Vasquez, and Biribawa, is at issue.

A.

The plaintiff's Second Amended Complaint asserts violation of his Fourth Amendment right against unreasonable searches and seizures. Defendant Spell concedes that the plaintiff's allegations sufficiently state a claim for a Fourth Amendment violation "under the liberal pleading standards applicable to pro se plaintiffs." (Doc. #90, p. 2). Defendants Vasquez and Biribawa contend that plaintiff's allegations do not state a claim for a Fourth Amendment violation. They assert that there would be a Fourth Amendment violation only if there was a warrantless search of a home's curtilage under the Citrus Canker Eradication Program, Florida Dep't of Agric. & Consumer Servs. v. Haire, 836 So.2d 1040 (Fla. DCA 4th 2003)[2], but argue the Second Amended Complaint fails to allege that any portion of plaintiff's property, other than his dwelling, is curtilage and fails to allege that the defendants searched any portion of the curtilage. (Doc. #88, pp. 2-6).

The concept of curtilage is important because the Supreme Court has recognized that Fourth Amendment protections extend to the home's curtilage, i.e., the area immediately surrounding the home, but does not extend to open fields. United States v. Dunn, 480 U.S. 294, 300 (1987); Olmstead v. United States, 265 U.S. 57, 59 (1924). While there is some tension between the heightened pleading requirements of civil rights cases involving qualified immunity and the liberal pleading requirements of a *pro se* litigant, the Court finds that the Second Amended Complaint to allege that a portion of the property surrounding the plaintiff's house

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2. According to the defendants, the Supreme Court of Florida has accepted jurisdiction of Haire and oral argument is set for October 7, 2003. (Doc. #88, p. 1).

is curtilage and that this portion was searched by defendants. As alleged in the Second Amended Complaint, the property is less than five acres, is surrounded by a fence, contains a locked gate, is not used for any regulated agricultural activities, and is visually obstructed from the nearest road by approximately 300 feet of dense foliage preserved by the plaintiff. Although the precise boundaries of the curtilage cannot be determined from the face of the Second Amended Complaint, it is clear that, at a minimum, the curtilage includes the area inside the "locked gate." Cf. United States v. Seidel, 794 F.Supp. 1098, 103-04 (S.D. Fla. 1992) (concluding that two and one-half acres, surrounded by a fence with a locked gate was curtilage despite fact that the defendant used the entire property to grow plants for commercial landscaping purposes). Thus, the Court concludes that the plaintiff has adequately alleged that all the remaining defendants searched a portion of his curtilage during their visit to the property on June 20, 2000, when they demanded that the plaintiff unlock the gate and then entered and proceeded with an inspection of the lands inside the gate.[3] (Doc. 60, pp. 11-15).

Since the Second Amended Complaint adequately alleges a search of the curtilage of the home without a warrant, the Court finds that plaintiff has alleged a Fourth Amendment violation. The Supreme Court has held that an administrative search of a home by municipal health and safety inspectors implicates the protections of the Fourth

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3. For the same reason, the Court concludes that the plaintiff has not adequately alleged that any defendants searched any portion of his curtilage during their visit on June 19, 2000.

Amendment. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 534 (1967). The District Court of Appeals for the Fourth District recently held that the warrantless searches of a home's curtilage by the Citrus Canker Eradication Program violated the Fourth Amendment. Haire, 836 So.2d at 1057. In reaching this conclusion, the Court relied on Camara and concluded that searched conducted pursuant to the Citrus Canker Eradication Program are akin to the types of administrative searches which require a warrant. Id. The Court recognized that Camara specifically excepted the warrant requirements for administrative inspections in emergency situations, such as to seize unwholesome food, but concluded that " [a]lthough there is an 'economic emergency' to the citrus industry from the spread of citrus canker, that does not suggest the type of emergency or exigent circumstance necessary to dispense with the warrant requirement." Id. at 1057-58. The Court agrees with the District Court of Appeals. Thus, the Court concludes that the plaintiff's allegations, if proven, would establish a constitutional violation under the Fourth Amendment.

B.

The plaintiff's Second Amended Complaint can also be read to assert a taking without just compensation under the Fifth Amendment. The Supreme Court has distinguished between two types of Takings Clause cases: physical takings and regulatory takings. Tahoe-Sierra Pres. Council, Inc. v Tahoe Reg'l Planning Agency, 535 U.S. 302, 321 (2002). A physical taking occurs either when there is a condemnation or a physical occupation of the property. Id. at 322; see also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-36 (1982). A regulatory taking occurs when some significant restriction is placed on an owner's use of his or her

property. Tahoe-Sierra, 535 U.S. at 323. The plaintiff has not alleged that either physical taking of his property has occurred or that a significant restriction has been placed on the use of his property. Thus, the Court concludes that the plaintiff's allegations, if proven, would not establish a violation of the Taking Clause of the Fifth Amendment.

C.

The plaintiff's Second Amended Complaint also an be read to assert due process rights under the Fifth Amendment and the Fourteenth Amendment. The Due Process Clause "requires that a private citizen be given notice and opportunity to be heard before government seizes his or her property." Quik Cash Pawn & Jewelry, Inc. v. Sheriff of Broward County, 279 F.3d 1316, 1322 (11th Cir. 2002) (citing Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972); see also Cryder v. Oxendine, 24 F.3d 175, 177 (11th Cir. 1994) (summarizing elements of due process violation under §1983. The plaintiff has not alleged that the defendants seized any of his property during their inspection of his land. Thus, the Court concludes that the plaintiff's allegations, if proven, would not establish a violation of the Due Process Clause of the Fifth or Fourteenth Amendment.

D.

Finally, the plaintiff's Second Amended Complaint can be read to assert equal protection rights under the Fourteenth Amendment. The Equal Protection Clause of the Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." It "does not forbid classifications. It simply keeps governmental decisionmaker from treating differently people who are in all

relevant respects alike." Panama City Med. Diagnostic Ltd. v. Williams, 13 F.3d 1541, 1545 (11th Cir. 1994) (quoting Nordlinger v. Hahn, 505 U.S. 1, 9 (1992)). To establish a violation of the Equal Protection Clause, the plaintiff must allege and ultimately prove discriminatory motive or purpose. Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation, 49 F.3d 1490, 1507 (11th Cir. 1995) (§1983 case). The plaintiff has not alleged that he was treated any differently in any respect from anyone else in a similar situation by the defendants; nor has he alleged discriminatory motive or purpose. Thus, the Court concludes that the plaintiff's allegations, if proven, would not establish a violation of the Equal Protection Clause of the Fourteenth Amendment.

IV.

Having concluded that the plaintiff's allegations regarding the defendants' search of his property on June 20, 2000, if proven, would establish a constitutional violation under the Fourth Amendment, the Court must now consider whether the defendants' actions violated clearly established constitutional law.[4] The plaintiff bears the burden on this issue. Wilson v. Blankenship, 163 F.3d 1284, 1288 (11th Cir. 1998).

For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

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4. Although the Court addressed this issue in its previous Order, the Eleventh Circuit's Opinion requires the Court to reconsider the issue in light of the Court's conclusion that the plaintiff's allegations, if proven, would establish a constitutional violation under the Fourth Amendment. (Doc. #86, p. 11).

This is not to say that an official action is protected by qualified immunity unless the very act in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Hope v. Pelzer, 536 U.S. 730, 739 (2002), quoting Anderson v. Creighton, 483 U.S. 635 (1987). Officials are entitled to "fair warning" that their conduct violates established law, but this does not require a previously decided case with materially similar facts. Hope, 536 U.S. 739-40. While there need not be existing precedent materially similar to the plaintiff's case, "the preexisting law must give real notice of practical value to government officials, considering the specific circumstances confronting them, and not just talk of some generalized, abstract intellectual concept." Pace v. Capobianco, 283 F.3d 1275, 1282 (11th Cir. 2002). The "relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 533 U.S. 194, 200 (2001).

Under the qualified immunity principles summarized above, the specific question is whether, as of June 20, 2000, it was clearly established that it was unlawful for state Department of Agriculture inspectors and/or deputy sheriffs to enter onto private property on which a dwelling was located and which was not being utilized for agricultural purposes and was not within a quarantine area, over the objection of the occupant, and inspect exterior plant material located within the curtilage of the property for citrus canker. The court answers the question in the negative.

The citrus canker history was briefly summarized in Florida Dep't of Agri. & Consumer Servs. v. City of Pompano Beach, 792 So.2d 539 (Fla. 4th DCA 2001), State v. Sun

Gardens Citrus, LLP, 780 So.2d 922 (Fla 2d DCA 2001), and Florida Dep't of Agric. & Consumer Servs. v Haire, 836 So.2d 1040 (Fla. 4th DCA 2003). The Florida Department of Agriculture and Consumer Services administers the Citrus Canker Eradication Program, which aims to eliminate a bacteria that is very harmful to citrus plants and affects the marketability of citrus fruit. The bacteria can spread rapidly, primarily by wind-blown rain. In 1985, citrus canker was discovered in Central Florida, and state and federal authorities took action to combat the bacteria by destroying diseased, as well as healthy, citrus plants. In 1995, citrus canker was found in South Florida. If the bacteria continues to spread, a federal quarantine could be placed on the State, which would effectively shut down the distribution of fresh citrus products to other states or internationally. The Florida Commissioner of Agriculture enacted Rule 5B-58.001, which established a quarantine area, spelled out procedures for treatment and eradication of citrus canker, and prohibited the planting or movement of citrus without the Department's permission. As part of its effort to eliminate citrus canker, the Department is permitted to enter onto property to inspect citrus for signs of the disease pursuant Fla. Stat. Ann. § 581.031 (15)(a).[5] Both

5. Florida law states that
The department has the following powers and duties:
(15) To inspect plants, plant products, or other things and substances that may be capable of disseminating or carrying plant pests, noxious weeds, or arthropods, and for this purpose shall have power to enter into or upon any place an to open any bundle, package, or other container containing, or thought to contain, such material, and to take possession of such material if determined by the department to pose a threat to the agricultural or public interests of the state.
Fla. Stat Ann. § 581.031(15) (2001).

the legislature and the courts have continuously relied upon the state's police power to protect the industry.

At the time of the events here -June 20, 2000 - no Florida appellate court had held a search warrant was needed under the circumstances at issue in this case.[6] Similarly, no Florida appellate court had held that the principles of Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967), should be extended to the present situation. Further, the Court concludes that the facts of Camara are not sufficiently similar to the facts of the present situation such that it would be clear to a reasonable officer that his conduct was unlawful in conducting a warrantless search of the plaintiff's property. In Camara, the Court addressed a "routine annual inspection for possible violations of the city's Housing Code." 387 U.S. at 525. Further, in Camara, the court specifically noted that a warrantless administrative search was permissible under certain "emergency situations" involving public health issues. Id. at 539; see also United States v. Richards, 638 F.2d 765, 770 (5th Cir. 1981) (citing Camara, 387 U.S. at 523) (noting that warrantless search is justified "when it is made for administrative purposes to satisfy a special governmental need

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6. As explained above, courts have addressed this issue after the time period relevant for the Court's inquiry. E.g., Florida Dep't of Agric. & Consumer Servs. v. Miami Dade County, 790 So.2d 1555 (Fla. 3d DCA 2001) (reversing, on other grounds, Florida circuit court holding that search warrant was needed); Florida Dep't of Agric. & Consumer Servs. v Haire, 836 So.2d 1040 (Fla. 4th DCA 2003) (holding that warrant was required for administrative search of curtilage for citrus canker).

and necessity outweighs the invasion entailed").[7]

As described above in more detail, the State of Florida has determined that a bacteria is spreading among citrus trees, which could effectively shut down the entire fresh citrus industry in the State. Although an administrative search conducted to eradicate an agricultural bacteria posing an economic emergency may not be the same as an administrative search conducted to address serious public health concerns it is also not he same as a routine administrative search to discover housing code violations. In other words, the administrative search at issue falls somewhere between the two extremes described in Camara. The court concludes that this was not clearly established at the time of the events described in the Second Amended Complaint.

Accordingly, it is now

ORDERED:

1. Count I of the Second Amended Complaint (Doc. #60) is dismissed as to defendants Vasquez, Biribawa, and Spell.

2. The Clerk shall enter judgement dismissing this action with prejudice, and close the file.

DONE AND ORDERED at Fort Myers, Florida, this 3rd day of July, 2003.

s/ John E. Steele
JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

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7. In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Copies:
Joseph Lee Grimm, pro se
Counsel of record
DCCD
DCLC

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CORRECTED

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-14011

[FILED UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT APR 30 2004
THOMAS K. KAHN CLERK]

JOSEPH LEE GRIMM, Plaintiff-Appellant,

versus

CHARLES S. SPELL,
a.k.a. Steve Spell,
PETER VASQUEZ, PROSSCOVIA BIRIBAWA,
GRABIELLA A. AVILEZ, in their individual capacities,
Defendants-Appellees,

JOHN C. MAUSEN,
SCOTT STAMETS, Defendants.

On Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion _____, 11th Cir. 19_, F.2d_). Before: BLACK, BARKETT and HULL, Circuit Judges.

PER CURIAM: The petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

Entered for the Court: /s/ Frank M. Hull UNITED STATES CIRCUIT JUDGE

ORD-42
(12/01)

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Florida Administrative Code (2000)
CHAPTER 5B-58
CITRUS CANKER

5B-58.001 Citrus Canker Eradication

(1) Definitions. For the purpose of this rule, the definitions in Section 581.011, Florida Statutes, and the following definitions shall apply:

(a) Approved landfill. A landfill that is fenced, that prohibits the removal of dumped material, and that requires that dumped material be covered at the end of every day on which dumping occurs.

(b) Citrus Canker Certificate. A document issued by an authorized representative of the department verifying compliance with the requirements of these rules.

(c) Citrus. All members and any hybrids of the subfamily Aurantioideae, of the family Rutaceae including any plants, plant parts, fruits, seeds and any other parts thereof. For the purpose of this rule the remaining subfamilies, Rutoideae and Toddalioiodeae, of the family Rutaceae are excluded from this definition.

(d) Citrus canker. A bacterial disease of citrus incited by the organism Xanthomonas axonopodis pv. citri, (formerly known as Xanthomonas campestris pv. citri), Asian strain.

(e) Commercial citrus grove. A solid set planting of 40 or more citrus trees.

(f) Commercial citrus-producing area. American Samoa, Arizona, California, Florida, Guam, Hawaii, Louisiana, Northern Mariana Islands, Puerto Rico, Texas, and the Virgin Islands of the United States.

(g) Exposed. Determined by the department to likely harbor citrus canker bacteria because of proximity to infected plants, or probable contact with personnel, or regulated articles, or other articles that may have been contaminated

with bacteria that cause citrus canker, but not expressing visible symptoms.

(h) Infected. Haboring citrus canker bacteria and expressing visible symptoms.

(i) Regulated articles. Any article capable of transporting or harboring citrus canker; including:
1. Trucks, tractors and all other equipment used in the quarantine area for the production, cultivation, harvesting, processing and packing, and transportation of citrus or regulated articles. 2. All lawn and garden tools and nursery equipment used in the quarantine areas. 3. Plant clippings and lawn and yard debris from the quarantine area.

(2) Purpose. This rule is enacted to prevent the spread of citrus canker and to eradicate citrus canker within the State of Florida. To accomplish that purpose, this rule declares citrus canker to be a plant pest and a nuisance, establishes a quarantine areas, establishes eradication and control procedures, prohibits the removal of citrus nursery stock or citrus nursery plants or plant products from the quarantine areas, regulates the sale of citrus fruit originating in the quarantine area, identifies regulated articles, and provides for entry of authorized representatives upon properties where citrus canker is known to exist or upon properties which have been exposed to citrus canker.

(3) Declaration of citrus canker as a plant pest. Pursuant to Section 581.031(6), Florida Statutes, citrus canker, is declared to be a plant pest and a nuisance capable of causing serious damage to citrus. Any citrus, or any other regulated article capable of transporting or harboring citrus canker and therefore capable of spreading the disease is also declared to be a nuisance.

(4) Quarantine area. An area around a site where an infestation of citrus canker is known to occur will be

quarantined. The geographical boundaries of the quarantine area shall be established by risk assessment procedures and will be published in a major newspaper of general distribution in each area affected and through other appropriate media. Risk assessment procedures will consider the agressiveness of the pathogen in the field, the level of disease inoculum, the location and spatial distribution of infected and exposed plants, the variety and type of plants, the risk of spread to areas growing citrus commercially, maintenance practices, and other relevant information. An area shall be released from quarantine provided no detections of citrus canker have occurred during a minimum two-year period of intensive survey and a declaration that citrus canker has been eradicated from the area.

(5) Control procedures.

(a) Risk Assessment. The department shall perform risk assessment procedures in the quarantine area to determine the steps necessary to eradicate, control, and prevent the dissemination of citrus canker. Risk assessment procedures will consider the aggressiveness of the pathogen in the field, the level of disease inoculum, the location and spatial distribution of infected and exposed plants, the variety and type of plants, the risk of spread to areas growing citrus commercially, maintenance practices, and other relevant information.

(b) Control Procedure Documents. The control procedures shall include the preparation of the following documents for each piece of property potentially harboring infected or exposed citrus. A report verifying the presence of, or exposure to, citrus canker through either a laboratory or field diagnosis. 1. A report verifying the presence of, or

exposure to, citrus canker through either a laboratory or field diagnosis. 2. A written inventory including size, condition, and variety of citrus located on the infected or exposed property. 3. A map of the infected or exposed property with the location of citrus subject to control action. 4. A recommendation for control action.

(c) Immediate Final Orders. The Department shall issue an Immediate Final Order stating the quarantine and control methods to be implemented on the infected or exposed citrus located on the property. A copy of the citrus canker diagnostic report, inventory, map, and recommendation referred to above will be attached to each respective Immediate Final Order. The Immediate Final Order will be provided to each property owner. If provided by personal delivery, the person making the delivery of the Immediate Final Order shall note on the order the date and time of delivery, the name of the recipient of the Order and the name of the person delivering the Order. If provided by mail, the Immediate Final Order shall be sent certified mail return receipt requested. The Immediate Final Order shall be immediately appealable or enjoinable. If the property owner is in agreement and signs the waiver accompanying the Immediate Final Order, control measures in accordance with risk assessment procedures shall proceed. If the property owner refuses to sign the waiver, then control measures mandated by risk assessment procedures shall begin no sooner than five days from the property owner's receipt of the Immediate Final Order. Immediate final orders are not required for control action in commercial citrus groves provided the owner agrees voluntarily to the control action and enters into an agreement not to sue with the department.

(d) Property File. The department shall maintain a property file for each separate piece of property. The file shall contain those documents that were required to be prepared

for risk assessment and the following: a copy of the Immediate Final Order with all attachments, a map identifying the location of infected or exposed citrus and the type of control action taken.

(6) Movement of citrus nursery stock or citrus plants.

(a) The movement or planting of citrus nursery stock, citrus plants or plant parts in the quarantine area is prohibited with the exception of citrus nursery stock planted in a commercial citrus grove as recommended by risk assessment procedures.

(b) Citrus nursery stock may move through the quarantine area for planting outside the quarantine area provided it is completely covered or enclosed in containers or in a compartment of a vehicle during movement. The shipment must be accompanied by an invoice denoting a purchaser outside of the quarantine area.

(7) Movement of citrus fruit originating within the quarantine area. Notwithstanding Subsection (6) of this rule, citrus fruit originating within the quarantine area may be moved from or within the quarantine area upon obtaining a citrus canker Citrus Fruit Harvesting Permit, Revised 6/99, DACS-08123 (formerly PI-123), from the Citrus Canker Program, 3027 Lake Alfred Road, Winter Haven, Florida 33881, and incorporated herein by reference, and be in compliance with the following requirements:

(a) The grove producing the fruit has been inspected by the department and found to be free of citrus canker. Groves must be mowed and otherwise maintained to facilitate inspection.

(b) The fruit has been treated in accordance with subsection (11) of this rule.

(c) The fruit is not destined for a commercial citrus -

producing area which is prohibited by the USDA in 7 CFR 301.75.

(d) All citrus harvesters, haulers, packers, and processors operating in the quarantine areas or handling regulated articles from the quarantine areas must sign a compliance agreement, DACS-08031, effective 5/99, and incorporated into this rule by reference. A copy of DACS-08031 may be obtained from the Citrus Canker Program, 3027 Lake Alfred Road, Winter Haven, Florida 33881.

(e) All movement of bulk fruit must be with a limited permit, DACS-08156, effective 6/99. A copy of DACS-08156 may be obtained from the Citrus Canker Program, 3027 Lake Alfred Road, Winter Haven, Florida 33881.

(8) Retail sale of citrus fruit. All citrus fruit sold by retail establishments must originate from outside the quarantine area or be in compliance with section (7). All retail establishments shall maintain records demonstrating compliance with this provision. Any retail establishment failing to maintain the required records shall be subject to stop sale of its citrus fruit.

(9) Movement of plant clippings and lawn and yard debris.

(a) Requirements. Plant clippings and lawn and yard debris may be moved from or within the quarantine area for disposal in an approved landfill or for composting in a recycling facility only under the following conditions:

1. The plant clippings or yard debris must be completely covered during transportation. 2. If mechanical failure prevents unloading of debris, the department shall be notified immediately. This material may not be stored or held overnight outside the quarantine area.

(b) Lawn maintenance operators within the quarantine

area shall demonstrate that they have: 1. Treated regulated articles in accordance with the requirements of subsection (13) of this rule upon departure from any property.
2. Treated personnel in accordance with the requirements of subsection (14) of this rule when departing from any property.

(c) Compliance Agreements. All lawn maintenance operations within the quarantine area shall have a citrus canker certificate for each movement demonstrating compliance with paragraph (a) or must enter into a compliance agreement DACS-08031, effective 5/99, providing for compliance with this rule. All lawn maintenance companies will be provided with a serialized decal upon signing a compliance agreement. Decals shall be prominently displayed on the driver's side of the windshield of the vehicle. All lawn maintenance operators shall on demand provide the department with a list that includes the names and physical address of all clients.

(10) Movement of citrus fruit through Quarantine Area. Notwithstanding subsection (6) of this rule, citrus fruit originating outside the quarantine area may be moved through the quarantine area without a citrus canker certificate provided the following conditions are met:

(a) Citrus fruit must be accompanied by a receipt or bill of lading verifying that the citrus fruit originated outside of the quarantine area;

(b) The citrus fruit must be completely covered or enclosed in containers or in a compartment of a vehicle during movement through the quarantine area, except that covering or enclosure is not required if the citrus fruit is moved through the quarantine areas without stopping except for refueling or for traffic conditions such as traffic lights or stop signs.

(11) Decontamination requirements. All harvesters,

intermediate handlers, grove caretakers, packers, and processors both within and outside of the quarantine area must decontaminate equipment and personnel and sign the applicable compliance agreement, DACS-08031, effective 5/99, and incorporated into this rule by reference. A copy of DACS-08031 may be obtained from the Citrus Canker Program, 3027 Lake Alfred Road, Winter Haven, Florida 33881.

(12) Treatment of citrus fruit. Citrus fruit for which treatment is required by this rule must be treated in accordance with label directions in one of the following ways in the presence of an authorized representative of the department, or at a facility operating under a compliance agreement, DACS-08031, effective 5/99, with the department:

(a) Thoroughly wetted for at least 2 minutes with a solution containing 200 parts per million sodium hypochlorite, with a solution maintained at a pH of 6.0 to 7.5, or

(b) Thoroughly wetted with a solution containing sodium o-phenyl phenate (SOPP) at a concentration of 1.86 to 2.0 percent total solution for 45 seconds if the solution has sufficient soap or detergent to cause a visible foaming action, or for 1 minute if the solution does not contain sufficient soap to cause a visible foaming action.

(13) Treatment of Regulated Articles. Regulated Articles for which treatment is required by this rule must be treated in one of the following ways in the presence of an authorized representative of the department, or at a facility operating under a compliance agreement with the department:

(a) All surfaces must be treated to the point of runoff with 200 parts per million sodium hypochlorite solution. A pH of 6.0 to 7.5 must be maintained in the solution.

(b) All surfaces must be treated to the point of runoff

with 2000 parts per million solution of quaternary ammonium chloride (0.2% OAC)

(c) All surfaces must be washed thoroughly to the point of runoff with a hot water and detergent solution under high pressure maintained at a minimum temperature of 160 degrees F. (71 degrees C).

(d) All surfaces must be thoroughly cleaned with steam with a minimum temperature of 160 degrees F (71 degrees C) maintained at the point of contact.

(14) Treatment of Personnel. Personnel departing from property in the quarantine area shall wash or treat all exposed areas of the body and clothing with an antibacterial soap, wash, spray or other approved solution.

(15) Citrus plants in containers. Maintaining citrus plants in containers within the quarantine areas is prohibited unless they are located in a nursery or nursery stock dealer establishment which is registered with the department. It shall be unlawful for nurseries or nursery stockdealers in the quarantine areas to add citrus plants to their inventory.

(16) Entry of authorized representatives. All owners and occupants of properties on which citrus canker is known or suspected to exist shall permit entry of authorized representatives of the Department of Agriculture and Consumer Services for purposes of inspecting, taking of specimens, or collecting suspect infected fruit, photographing or documenting tree information, applying or supervising treatments, or conducting control activities.

Specific Authority 570.07(21), (23), 581.031(1), (4), (5), 581.091(1), 581.101(1), 581.184 FS. Law Implemented

570.07(2), (13), (21), 581.031(6), (7), (9), (15), (17), 581.083, 581.101, 581.131, 581.141, 581.184, 581.211 FS. History-New 1-17-96, Amended 4-9-96, 5-14-97, 8-19-97, 11-19-97, 11-16-99, 7-17-00.

End of APPENDIX.

No. 04-168

SUPREME COURT, U.S.
FILED
OCT 19 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JOSEPH LEE GRIMM,

Petitioner,

v.

CHARLES S. SPELL, aka STEVE SPELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT CHARLES S. SPELL

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QUESTIONS PRESENTED

Is a deputy sheriff sued under 42 U.S.C. § 1983 for violating a plaintiff's Fourth Amendment right to be free from warrantless searches prohibited from raising the defense of qualified immunity merely because the complaint sufficiently alleges a § 1983 claim?

Did the Eleventh Circuit correctly determine that Collier County Sheriff's Deputy Spell is entitled to qualified immunity for participating in a warrantless inspection of citrus trees located within the residential yard of a homeowner, over the homeowner's objection, when the search was pursuant to a then-valid state statute which authorized the search?

Did the Eleventh Circuit correctly determine that a warrantless inspection of citrus trees located within the residential yard of a homeowner, over the homeowner's objection, pursuant to a then-valid state statute does not constitute a violation of the takings clause of the Fifth Amendment?

Did the Eleventh Circuit correctly determine that a warrantless inspection of citrus trees located within the residential yard of a homeowner, over the homeowner's objection, pursuant to a then-valid state statute does not constitute a violation of the equal protection clause of the Fourteenth Amendment?

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REASONS FOR DENYING THE PETITION

The Court should deny Petitioner Joseph Lee Grimm's ("Grimm") petition for writ of certiorari ("Petition"). The decision below of the Eleventh Circuit Court of Appeals does not conflict with any decision of this Court, of another United States Court of Appeals, or of a state court of last resort regarding an important federal question. *See* Supreme Court Rule 10(a). In addition, the decision below does not depart so far from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power. *Id.*

MISSTATEMENTS OF FACT AND LAW IN THE PETITION

Supreme Court Rule 15(2) requires a party opposing a petition for writ of certiorari to address all misstatements of fact and law contained within a petition. Pursuant to Rule 15(2), Deputy Spell identifies two misstatements contained within Grimm's Petition.

Grimm's statement of facts is generally accurate. However, it omits one important detail concerning the state statutes Collier County Sheriff's Deputy Charles S. Spell ("Deputy Spell) relied upon in concluding that Respondents Peter Vasquez and Prosscovia Biribawa (the "Department Inspectors") had a right to inspect Grimm's trees without a warrant. In response to Grimm's question as to whether Deputy Spell was in possession of a warrant authorizing the Department Inspectors to examine his trees, the Petition has Deputy Spell telling Grimm, "that he had no warrant and that no warrant is required under Florida law." *See* Petition, pg. ix. While generally accurate, this statement is nonetheless misleading because it omits the fact that Deputy Spell told Grimm that two specific statutes authorized his and the

Department Inspector's actions. According to the Second Amended Complaint, Deputy Spell told Grimm prior to the inspection that he and the Department Inspectors were acting pursuant to Florida Statutes §§ 581.031 and 581.211. *See* Second Amended Complaint, ¶¶ 22 & 26. This distinction is critical to Deputy Spell's defense. As demonstrated below, Fla. Stat. § 581.031 (2000), on its face, plainly authorized the Department Inspectors to inspect Grimm's trees without a warrant. Moreover, Fla. Stat. § 581.211 plainly authorized Deputy Spell to arrest Grimm if he interfered with the inspection.

The second misstatement in the Petition is a misstatement of law. Grimm erroneously asserts that Florida law prohibited Department Inspectors from inspecting citrus trees for citrus canker unless the area being inspected had first been quarantined by the Florida Department of Agriculture and Consumer Services (the "Department"). This is not the case. Florida Statute § 581.031(15)(a) (2000) permits Department Inspectors to inspect plants for plant pests, including citrus canker, anywhere within the State of Florida, regardless of whether the area in question is under quarantine.[1] *See also* Fla. Stat. § 581.031(7).

---

1. Grimm's claim that Department Inspectors cannot inspect trees not within a quarantined area also defies common sense. The Department cannot quarantine an area unless it first has reason to believe it is infested with citrus canker. Before it can quarantine an area, the Department must first inspect trees within an area to determine whether an infestation exists. Without the power to inspect trees in areas not already under quarantine, it would be difficult for the Department to impose a quarantine in the first place.

ARGUMENT

I. The Eleventh Circuit Correctly Held That Deputy Spell Is Entitled To Assert The Defense Of Qualified Immunity

The Eleventh Circuit held that, "it is clear that the defendants were acting within the scope of their discretionary authority when they inspected Grimm's property." *See* Appendix A-I-7. Based upon this finding, the Eleventh Circuit determined that Deputy Spell is entitled to assert the defense of qualified immunity. *Id.* In the Petition, Grimm asserts that the Eleventh Circuit erred in concluding that Deputy Spell is entitled to assert the defense of qualified immunity because, according to Grimm, Deputy Spell was not acting within the scope of his discretionary authority. Grimm reaches this conclusion by advancing the following flawed syllogistic reasoning. The defense of qualified immunity may only be asserted by police officers who are acting within their discretionary authority. Police officers do not have discretionary authority to violate the Constitution. The allegations in the complaint, which must be accepted as true, establish that Deputy Spell violated Grimm's Fourth Amendment rights. Because Deputy Spell does not have discretionary authority to violate Grimm's Fourth Amendment rights, Deputy Spell was not acting within the scope of his discretionary authority when he violated Grimm's Fourth Amendment Rights. Because Deputy Spell was not acting within the scope of his discretionary authority, he is precluded from asserting the defense of qualified immunity.

Grimm's argument is both flawed and contrary to the decisions of this Court. In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), this Court held that courts may not even address the issue of qualified immunity unless there is a prior finding that the allegations in the complaint establish that the defendant asserting the defense of qualified

immunity has violated the plaintiff's constitutional rights. Grimm's argument is directly contrary to *Saucier* and completely misunderstands the defense of qualified immunity — that it is a defense applicable when a government official has actually infringed (or alleged to have infringed) upon a constitutional right. If Grimm's logic were to prevail, the defense of qualified immunity would be completely lost. The Eleventh Circuit's finding that Deputy Spell's actions violated Grimm's Fourth Amendment rights does not preclude Grimm from asserting the defense of qualified immunity. Instead, it gives rise to the occasion to assert the defense. Thus, the Eleventh Circuit correctly held that Deputy Spell was entitled to assert the defense of qualified immunity.

II. The Eleventh Circuit Correctly Held That Deputy Spell Is Entitled To Qualified Immunity As To Grimm's Fourth Amendment Claim

Grimm petitions this Court to exercise its discretionary jurisdiction to resolve what he characterizes as a conflict between the Eleventh Circuit's determination that Deputy Spell is entitled to qualified immunity and this Court's decision in *Camara v. Municipal Court of the City & Co. of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967). Grimm argues Deputy Spell is not entitled to qualified immunity because, on the date in question, the *Camara* case clearly established that Deputy Spell's conduct was unconstitutional. Grimm also argues that a 1984 Florida Attorney General Opinion clearly established that Deputy Spell's conduct was unconstitutional. However, contrary to Grimm's assertions, the Eleventh Circuit's determination that Deputy Spell is entitled to qualified immunity does not conflict with any decision of this Court.

The Eleventh Circuit's finding that Deputy Spell is entitled to qualified immunity is correct for two reasons. First and foremost, the Eleventh Circuit found that Deputy Spell's actions were pursuant to two apparently valid Florida Statutes. Second, neither the *Camara* case nor the Florida Attorney General Opinion provided Deputy Spell fair warning that a warrantless search of Grimm's trees was unconstitutional.

The essence of qualified immunity analysis is reasonableness — whether or not, given the then-current state of the law, it was reasonable under the circumstances for a government official to violate a plaintiff's constitutional right.[2] *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Malley v. Briggs*, 475 U.S. 335, 340, 106 S. Ct. 1092, 1095, 89 L. Ed. 2d 271 (1986). If the official's mistake was reasonable, then the official is entitled to qualified immunity. *Id.* The Eleventh Circuit concluded that Deputy Spell's actions violated Grimm's Fourth Amendment rights. *See* Appendix A-I-7. Thus, the resolution of Deputy Spell's qualified immunity claim boils down to whether he made a reasonable mistake: Was it reasonable for Deputy Spell to conclude that Fla. Stat. § 581.031 authorized the Department Inspectors to enter Plaintiff's property without a warrant and inspect Plaintiff's trees? Was it reasonable for Deputy Spell to conclude that F.S. § 581.211 authorized him to arrest the Plaintiff if the Plaintiff interfered with the Department Inspectors' inspection? The Eleventh Circuit correctly concluded that Deputy Spell's conclusions were reasonable and, therefore, he is entitled to qualified immunity.

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2. Qualified immunity analysis presupposes the existence of a constitutional violation. *See Saucier v. Katz*, *supra*.

a. Law Enforcement Officers Are Entitled To Presume That State Statutes Are Constitutional

The Second Amended Complaint specifically alleges that Deputy Spell relied on Florida Statutes §§ 581.031 and 581.211 as authority to inform Grimm that: (1) the Department Inspectors were authorized to enter his yard to inspect his citrus trees; and (2) that Grimm could be subject to arrest if he interfered with the inspection. *See* Second Amended Complaint, ¶¶ 22 & 26. Deputy Spell contends that the Eleventh Circuit correctly determined that he is entitled to qualified immunity for violating Grimm's Fourth Amendment rights because his actions were in good faith and based upon a reasonable reading of Florida Statutes §§ 581.031 and 581.211.

Florida Statute § 581.031 (2000) grants the Department extensive authority to regulate plants located within the State of Florida. For instance, F.S. § 581.031(4) authorizes the Department to regulate the bringing in of all plants into the State of Florida. Florida Statute § 581.031(6) allows the Department to declare as a nuisance any plant pest and anything infected by or exposed to a plant pest. Florida Statute § 581.031(7) authorizes the Department to declare a quarantine over all or part of any area or county within the State of Florida if the Department determines that the quarantined area sustains a plant pest which threatens the agricultural, horticultural, or public interest of the State. Florida Statute § 581.031(14)(a) allows the Department to test nursery stock or any other article to determine whether it harbors plant pests. Florida Statute § 581.031(17) authorizes the Department to cause the destruction of plants capable of harboring plant pests if they are infected or located in an area which may be suspected of being infected by plant pests.

As part of this statutory scheme to control plant pests, the Florida legislature grants the Department broad authority to inspect plants for the presence of pests. Florida Statute § 581.031(15)(a) authorizes the Department to inspect any plant that may be capable of disseminating or carrying plant pests. Furthermore, § 581.031(15)(a) specifically authorizes the Department to enter upon any place thought to contain a plant pest which poses a threat to the interests of the State. As noted by the Eleventh Circuit, § 581.031 does not require a warrant before such inspections may be conducted. *See* Appendix A-I-4. Clearly, Fla. Stat. § 581.031, on its face, authorizes Department Inspectors to enter a person's yard without a warrant and inspect any plant located within the yard for plant pests. Deputy Spell's statement to Grimm that Fla. Stat. § 581.031 authorized the Department Inspectors to enter onto Grimm's yard without a warrant was entirely reasonable and based upon the plain wording of § 581.031.

Similarly, Deputy Spell's statement to the Plaintiff that interference with the Department Inspectors' inspection could result in Plaintiff's arrest was also reasonable in light of Fla. Stat. § 581.211 (2000). Florida Statute § 581.211(1)(c) states, "Any person who . . . interferes with or obstructs any director or authorized representative of the [D]epartment in the performance of his or her duties . . . commits a misdemeanor in the first degree . . ." *See* Fla. Stat. § 581.211(1)(c) (2000). Given that Fla. Stat. § 581.031 authorized the Department Inspectors to conduct an inspection on Grimm's property, Deputy Spell acted reasonably in informing Grimm that Fla. Stat. § 581.211 authorized him to arrest Grimm if he continued to refuse to allow the Inspectors to conduct their inspection.

The Eleventh Circuit properly noted that "the face of Florida Statute § 581.031 allows inspections and does not mention a warrant, stating that [the Department] has the

power and duty 'to inspect plants, plant products, or other things and substances that may be capable of disseminating or carrying plant pests, noxious weeds, or arthropods, and for this purpose shall have power to enter into or upon any place." *See* Appendix A-I- 4. The Eleventh Circuit also noted that Fla. Stat. § 581.184(9) directs that, "upon request of [the Department], the sheriff . . . shall provide assistance in obtaining access to private property for the purpose of enforcing the provisions of this section." *See* Appendix A-I-4.[3]

Based upon the foregoing, it is imminently clear that Deputy Spell reasonably interpreted Fla. Stat. § 581.031 as authorizing the Department Inspectors to enter onto Plaintiff's property without a warrant to inspect citrus trees in the yard. Deputy Spell also reasonably interpreted Fla.Stat. § 581.211(1) to authorize him to arrest the Plaintiff if the Plaintiff interfered or obstructed with the inspection.

It is a well-established principle in the State of Florida that laws are presumed constitutional until they are declared unconstitutional. *See Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. 5th DCA 2002). If any doubt exists as to the validity of a law, it must be resolved in favor of constitutionality where reasonably possible. *Id.*

> When construing statutes, the courts must assume that the Legislature intended to enact an effective law. Statutes are presumptively valid and constitutional, and will be given effect if possible. All doubts will be resolved in favor of constitutionality . . . Acts of the Legislature are

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3. Curiously, the Eleventh Circuit relied solely on § 581.184(9) as providing Deputy Spell with apparent authority to arrest Grimm if he obstructed the inspection. Respondent contends the Eleventh Circuit should also have found that Fla. Stat. § 581.211(1) provided Deputy Spell with this authority.

> presumed valid and an act will not be declared unconstitutional unless it is determined to be invalid beyond a reasonable doubt.

See Department of Business Regulation v. Smith, 471 So. 2d 138, 142-43 (Fla. 1st DCA 1985) (internal citations omitted).

This principle of law is not unique to Florida jurisprudence. In *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153, 64 S. Ct. 474, 479, 88 L. Ed. 2d 425 (1944), this Court stated, "State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared." As noted by the Eleventh Circuit, as of June 20, 2000, no court had declared § 581.031 or § 581.184(9) unconstitutional and no court had held that a search warrant was needed under the circumstances at issue in this case. *See* Appendix A-I-8-9. Similarly, as of June 20, 2000, no court had declared § 581.211 unconstitutional. Therefore, under the foregoing case law, Deputy Spell was entitled to presume that §§ 581.031, 581.211, and 581.184(9) were constitutional and valid.

In *Pierson v. Ray*, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967), this Court held that an officer who makes an arrest based upon probable cause that an arrestee has violated a statute is entitled to qualified immunity in a § 1983 action for false arrest even though the statute was later declared unconstitutional. This Court in *Pierson* stated, "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Id.* at 555, 87 S. Ct. at 1218. This Court held that qualified immunity was appropriate because the officer should be excused from liability "for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied." *Id.*

In *Michigan v. DeFillippo*, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 323 (1979), this Court addressed, in the context of the applicability of the exclusionary rule, "whether an arrest made in good-faith reliance on an ordinance, which at the time had not been declared unconstitutional, is valid regardless of a subsequent judicial determination of its unconstitutionality." *Id.* at 33, 99 S. Ct. at 2629. In answering this question in the affirmative, the Court rejected the notion that the officer "should have known the ordinance was invalid and would be judicially declared unconstitutional." *Id.* at 37, 99 S. Ct. at 2632. This Court stated:

> At [the time of arrest], of course, there was no controlling precedent that this ordinance was or was not constitutional, and hence the conduct observed violated a presumptively valid ordinance. A prudent officer . . . should not have been required to anticipate that a court would later hold the ordinance unconstitutional.
>
> Police are charged to enforce laws until and unless they are declared unconstitutional. *The enactment of a law forecloses speculation by enforcement officers concerning its constitutionality* — with the possible exception of a law so grossly and flagrantly unconstitutional that any person of reasonable prudence would be bound to see its flaws. Society would be ill-served if its police officers took it upon themselves to determine which laws are and which are not constitutionally entitled to enforcement.

Id. at 38-39, 99 S. Ct. at 2632. (emphasis added)

This Court's reasoning in *DeFillippo* applies to this case. At the time of the inspection of Grimm's citrus trees, no court or other authority had ever held that Fla. Stat. § 581.031 was unconstitutional. It is not the function of patrol officers to speculate as to the constitutionality of valid Florida statutes. Deputy Spell, as a law enforcement officer, has a duty to follow the laws of the State of Florida until they are declared invalid. Deputy Spell was therefore entitled to assume that Fla. Stat. § 581.031 was valid and that the Department Inspectors were authorized to inspect Grimm's citrus trees.[4]

While *Pierson* and *DeFillippo* involve the validity of an arrest made pursuant to a statute subsequently declared unconstitutional, *Illinois v. Krull*, 480 U.S. 340, 107 S. Ct. 1160, 94 L. Ed. 2d 364 (1987), involves the legality of a warrantless administrative search conducted pursuant to a statute that is subsequently declared unconstitutional. In *Krull*, this Court held that the exclusionary rule does not apply to evidence seized pursuant to a warrantless search authorized by a statute subsequently declared unconstitutional if the officers reasonably relied upon the statute being constitutional. Referring to the concept of qualified immunity and *Harlow v. Fitzgerald*, *supra*, this Court stated:

> A statute cannot support objectively reasonable reliance if, in passing the statute, the legislature

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4. Both *Pierson* and *DeFillippo* concern the validity of an *arrest* made pursuant to a statute subsequently declared unconstitutional. No arrest was made in this case because Grimm ultimately allowed the Department Inspectors to conduct an inspection. As a result, Deputy Spell had no occasion to arrest Grimm for obstruction under Fla. Stat. § 581.211. However, had Grimm obstructed the inspection and had Deputy Spell arrested him under F.S. § 581.211, it is clear that under *Pierson* and *DeFillipo* Deputy Spell would be entitled to qualified immunity from a § 1983 claim for false arrest.

> wholly abandoned its responsibility to enact constitutional laws. Nor can a law enforcement officer be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional. . . . As we emphasized in *Leon*, the standard of reasonableness we adopt is an objective one; the standard does not turn on the subjective good faith of individual officers.

Krull, 480 U.S. at 355, 107 S. Ct. at 1170. But absent a situation where the legislature wholly abandoned its responsibility to enact constitutional laws, this Court in *Krull* stated:

> Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. . . 'Penalizing the officer for the legislature's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.'

Id. at 349-350, 107 S. Ct. at 1167.

Both the Eleventh Circuit and the district court correctly determined that it was not clearly established as of June 20, 2000 that Fla. Stat. § 581.031 was unconstitutional or that a search warrant was required where a landowner objected to a warrantless inspection of his trees pursuant to this section. *See* Appendix A-I-7-9; Appendix A-II-13 The lower courts correctly noted that at the time of the inspection, no Florida

or Federal court had ruled that a search warrant was required before Department employees could enter a homeowner's property to inspect trees for citrus canker. *Id.* Based upon the foregoing Deputy Spell was reasonably entitled to presume that § 581.031 was valid law and permitted the Department Inspectors to conduct a warrantless inspection of Grimm's trees over Grimm's objections.

b. The Eleventh Circuit Correctly Affirmed The District Court's Finding That *Camara v. Municipal Court of the City & Co. of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), Did Not Clearly Establish That The Department Inspectors' Warrantless Inspection Of Grimm's Trees Was Unconstitutional

The Eleventh Circuit correctly affirmed the district court's finding that *Camara v. Municipal Court of the City & Co. of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967), did not clearly establish that the Department Inspectors' warrantless inspection of Grimm's trees was unconstitutional. *See* Appendix A-I-9-10; Appendix A-II-13-14. *Camara* is distinguishable in several significant respects. The relief sought in *Camara* was a writ of prohibition to a criminal court where the plaintiff was being prosecuted for refusing to permit a warrantless inspection of the interior of his residence. *Camara*, unlike this case, did not involve a § 1983 action for damages.[5] A second distinction is that *Camara* concerned a warrantless inspection of the interior of a residence. This case, unlike *Camara*, does not involve an inspection of the interior of Grimm's residence.

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5. In fact, if *Camara* had involved a § 1983 false arrest claim against the arresting officer, applying the reasoning of *Pierson*, *supra*, and *DeFillippo*, *supra*, it is clear that the arresting officer would have been qualifiedly immune from suit because he arrested the plaintiff in reliance upon a then-valid state statute.

The inspection at issue here is of citrus trees located in Grimm's yard. The privacy concerns here are much lower that those involved in *Camara*. A third distinction is that the purpose of the inspection in *Camara* was to determine if the plaintiff was illegally using his leasehold as a personal residence. *See Camara*, 387 U.S. at 526, 87 S. Ct. at 1729. Conversely, the purpose of the inspection in this case was to determine if Plaintiff's trees were infected with citrus canker — a condition which is entirely due to natural causes and would not reflect any illegal activity on the Plaintiff's part. *See generally Florida Dept. of Agriculture & Consumer Services v. City of Pompano Beach*, 792 So.2d 539 (Fla. 4th DCA 2001) and *State v. Sun Gardens Citrus, LLP*, 780 So. 2d 922 (Fla. 2d DCA 2001). Another distinction is that the objects of the inspection, citrus trees, are traditionally regulated within the State of Florida. *Id.*; *see also* Chapter 581, Florida Statutes (2000).

Plaintiff's reliance on a 1984 Florida Attorney General opinion, AGO 84-32, as clearly establishing that Deputy Spell's actions were unconstitutional is misplaced for several reasons. First, Attorney General opinions do not create clearly established law. *See Jenkins v. Talladega City Bd. of Education*, 115 F.3d 821, 827 n.4 (11th Cir. 1997) (holding that only opinions from this Court, the Eleventh Circuit, and the Supreme Court of Florida clearly establish law for qualified immunity purposes). Second, the opinion cited by Plaintiff refers to municipal code inspectors, not to citrus canker inspectors. Lastly, the opinion cited does not express any opinion on the constitutionality of Fla. Stat. § 581.031, a presumptively valid state statute.

Given the fact that Fla. Stat. § 581.031, a presumptively valid and constitutional statute, authorized the warrantless inspection of Grimm's trees and the significant differences between the facts in *Camara* and the circumstance involved

in the present case, it cannot be said that *Camara* clearly established that the inspection of Plaintiff's trees was unconstitutional. With respect to whether Deputy Spell reasonably should have known that § 581.031 was unconstitutional, "it must also be remembered that the knowledge and understanding of law enforcement officers and their appreciation for constitutional intricacies are not to be judged by the standards applicable to lawyers." *See United States v. Cardall*, 773 F.2d 1128, 1133 (10th Cir. 1985). It also must be remembered that:

> Such officials as police officers . . . who enjoy only qualified immunity, routinely make close decisions in the exercise of the broad authority that necessarily is delegated to them. These officials are subject to the plethora of rules 'often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively' . . . In these circumstances, officials should not err always on the side of caution.

See Davis v. Scherer, 468 U.S. 183, 196, 104 S. Ct. 3012, 3020, 82 L. Ed. 2d 139 (1984), *quoting* P. Schuck, Suing Government 66 (1983).

The determination of whether Deputy Spell is entitled to qualified immunity turns on whether his actions were reasonable under the circumstances. Because officers of reasonable competence could disagree on whether, in light of Fla. Stat. § 581.031, Deputy Spell violated Grimm's constitutional rights, Deputy Spell is entitled to qualified immunity. *See Malley*, 475 U.S. at 341, 106 S. Ct. at 1096. In this case Deputy Spell informed Grimm that the agricultural inspectors had a right under Fla. Stat. § 581.031 to conduct a warrantless inspection of his citrus trees to

check for the presence of citrus canker. The inspection at issue concerned an inspection of trees in Grimm's yard. The inspection did not involve entry into his home or automobile or an inspection of any of his papers.

In *Garner v. Memphis Police Dept.*, 600 F.2d 52 (6th Cir. 1979), *aff'd Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), a police officer shot in the back an unarmed 15 year old boy who was fleeing the scene of a burglary. The officer shot the boy not because of any imminent danger but because he feared the boy would escape capture. The shooting was pursuant to a state statute which authorized the use of all necessary force to stop a fleeing felon. Subsequently, the officer was sued under § 1983 for violating the boy's Fourth Amendment constitutional rights. The Sixth Circuit affirmed the trial court's finding that the officer was entitled to qualified immunity because he acted pursuant to a valid state statute. On appeal in *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985), this Court did not disturb the Sixth Circuit's ruling on the officer's entitlement to qualified immunity but found both the shooting and the statute authorizing the shooting were unconstitutional. If the police officer in *Garner* was entitled to qualified immunity for shooting a boy in the back because the officer acted pursuant to a valid state statute which was subsequently declared unconstitutional, then Deputy Spell certainly is entitled to qualified immunity here. The Fourth Amendment intrusion of inspecting door-yard trees for citrus canker is minuscule in comparison to the intrusion in *Garner*.

III. The Eleventh Circuit's Ruling That The Second Amended Complaint Does Not State A Fifth Amendment Claim Does Not Conflict With Any Decision of This Court or Of Any Other Court of Appeals

The Eleventh Circuit adopted the district court's finding that the Second Amended Complaint failed to state a claim for taking without just compensation under the Fifth Amendment. *See* Appendix A-I-7. The district court and, through adoption, the Eleventh Circuit correctly held that the Department Inspectors' entry onto Grimm's property to inspect his citrus trees for the presence of citrus canker neither effected a physical taking nor a regulatory taking of his property under the Fifth Amendment. *See* Appendix A-II-8-9, *citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). In his Petition, Grimm admits his Fifth Amendment claim is novel. *See* Petition, pgs. 8-11. Because the Fourth Amendment "provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct" (warantless searches of private property), the Fourth Amendment governs this case, and not the more attenuated (under the circumstances in this case) Fifth Amendment protection from taking of private property for public use without compensation. *See generally Graham v. Connor*, 490 U.S. 386, 394-95, 109 S. Ct. 1865, 1870-71, 104 L. Ed. 2d 443 (1989) (holding that the substantive due process clause of the Fourteenth Amendment cannot supply the basis for a civil rights claim if the challenged governmental conduct is prohibited by another, more specific, constitutional right). Accordingly, the Eleventh Circuit correctly affirmed the dismissal of Grimm's Fifth Amendment claim for failure to state a claim.

IV. The Eleventh Circuit's Ruling That The Second Amended Complaint Does Not State An Equal Protection Claim Does Not Conflict With Any Decision of This Court or Of Any Other Court of Appeals

The Eleventh Circuit adopted the district court's finding that the Second Amended Complaint failed to state an equal protection claim. *See* Appendix A-I-7. The district court and, through adoption, the Eleventh Circuit correctly held that the Department Inspectors entry on to Grimm's property to inspect his citrus trees for the presence of citrus canker did not violate the equal protection clause of the Fourteenth Amendment. *See* Appendix A-II-9-10.

Grimm's convoluted equal protection claim is premised upon his mistaken belief that Florida law only permitted the Department to inspect trees on lands that have previously been quarantined. *See* Petition, pgs. 11-12. As shown earlier, Fla. Stat. § 581.031(15)(a) contains no such limitation. Therefore, Grimm's claim that the Respondents may be presumed to have improperly constructively classified his property as quarantined by entering upon his property falls under its own weight.

Additionally, the district court properly dismissed Grimm's equal protection claim because the Second Amended Complaint failed to allege that Respondents treated him differently from others similarly situated and that the disparate treatment arose out of a discriminatory motive or purpose. *See* Appendix A-II-9-10, *citing Panama City Med. Diagnostic Ltd. v. Williams*, 13 F.3d 1541, 1545 (11th Cir. 1994) and *Cross v. State of Ala., State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1507 (11th Cir. 1995).

CONCLUSION

For the foregoing reasons, Respondent, Deputy Charles Spell, asks that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
FILED
OCT 22 2004
OFFICE OF THE CLERK

No. 04-168

IN THE

Supreme Court of the United States

JOSEPH LEE GRIMM,

Petitioner,

v.

CHARLES S. SPELL, a/k/a STEVE SPELL, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS PETER VASQUEZ AND PROSSCOVIA BIRIBAWA

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INTRODUCTION

Petitioner, Joseph Lee Grimm, has not identified any basis for invoking this Court's very narrow certiorari jurisdiction. He has not alleged any conflict among the Circuits or asserted the need for resolution of a question of federal law that has not been previously addressed. On the contrary, this Court has already examined and crafted the law regarding the primary issue presented in his Petition—the parameters of qualified immunity afforded a government official. Moreover, the Eleventh Circuit Court of Appeal, which affirmed the dismissal of Grimm's action on the basis of qualified immunity, had the benefit of, and applied, this Court's most recent pronouncement of applicable law when it reached its appropriate conclusion. Therefore, it is apparent that Grimm is seeking *de novo* review of the case presented without identifying any basis for invoking this Court's jurisdiction.

Notwithstanding the lack of any basis for invoking this Court's discretionary review, the Eleventh Circuit's conclusion is completely correct. Respondents, Prosscovia Biribawa and Peter Vasquez, employees of the Department of Agriculture and Consumer Services (the "Department"), reasonably believed they were authorized to enter Grimm's yard to look at leaves on citrus trees pursuant to a statutory grant of authority and the Florida Commissioner of Agriculture's clear declaration of emergency. At the time the Department employees entered Grimm's yard for this limited purpose, no Florida Court had contradicted the statutory authority to conduct a warrantless search and, in fact, multiple Florida courts recognized the exigent circumstances posed by citrus canker that required immediate inspection and tree removal. The Court should deny the Petition.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition because the law was not so well-settled at the time the Department employees entered Grimm's property that they should be denied qualified immunity and held individually liable for alleged Fourth Amendment violations.

When the Department employees entered Grimm's property for the limited purpose of examining leaves on a citrus tree, Florida law clearly authorized the limited intrusion due to exigent circumstances presented by citrus canker's onslaught. That a Florida state court years later decreed that state authorities needed a warrant to inspect dooryard citrus cannot override qualified immunity when contrasted with existing Florida law at the time the Department employees conducted the subject inspection.

Furthermore, the entry onto property for a limited inspection of a citrus tree does not constitute a taking which requires compensation under the Fifth Amendment. There is no seizure of property or deprivation of the economic benefit of property resulting from the inspection.

Finally, Grimm cannot assert an equal protection claim because he has not alleged membership in any protected class or that he received unequal treatment from the Department.

STATEMENT OF THE CASE

Because the United States District Court, Middle, District, disposed of this case at the pleading stage, all of Grimm's allegations are accepted as true and correct. For the benefit of the Court, however, the following is a history

of Florida's battle with citrus canker and the Citrus Canker Eradication Program ("CCEP") enunciated by Florida's Supreme Court in *Haire v. Fla. Dep't of Agriculture,* 870 So. 2d 774 (Fla. 2004), citing *Dep't of Agriculture v. Pompano Beach*, 792 So. 2d 539, 541-42 (Fla. 4th DCA 2001):

> Citrus canker was discovered in Florida in 1914 and eradication programs continued through the mid 1930s. In the mid 1980s, an Asian strain of citrus canker, xanthomonas axonopodis pv. citri., the strain of citrus canker at issue in this case, was discovered in Manatee County. It was considered eradicated in 1992 and the eradication program halted in 1994. However, in 1995 an outbreak was discovered around the Miami International Airport.
>
> Citrus canker is a disease that is caused by a bacterial organism that attacks the fruits, leaves and stems of a citrus plant. It causes defoliation, fruit drop and loss of yield. It also causes blemishes on the fruit and a loss of quality. In severe cases, it can cause girdling of the stems and death of the tree.
>
> Stem lesions can survive for many years and are capable of producing bacterial inoculum eight to ten years later. Although symptoms of citrus canker may be seen seven to fourteen days after infection, the maximum visualization does not occur until approximately 107 to 108 days after infection. This makes it difficult to control a disease which easily spreads through wind-driven rain or contamination of equipment or plant material.

* * * *

At the time that citrus canker, Asian strain, was discovered in Miami, the citrus canker eradication program in place called for the destruction of trees that were infected or were within a 125 foot radius of an infected tree. The 125 foot radius was adopted in the 1980s as a result of a study conducted in Argentina. However, that study did not take into account what would happen in an urban setting.

In Miami-Dade County, the destruction of citrus trees within a 125 foot radius of an infected tree was not reducing the occurrences of citrus canker. Therefore, the Department decided to initiate a study that would measure the distances that citrus canker, Asian strain, would spread in South Florida. The study kept track of over 19,000 trees in four sites and determined the distance between the diseased trees and the newly infected trees. The study showed that the eradication program which used the 125 foot radius was inadequate because it only captured about thirty to forty-one percent of infection that spread from a diseased tree.

The results of the study were presented at a meeting in Orlando attended by approximately twenty individuals and scientists. Those at the meeting examined the findings. After considering a range of distances between diseased trees and newly infected trees at the various sites, those present determined that in order to destroy ninety-

> five percent of newly infected trees, it was necessary to destroy trees within a 1900 foot radius of a diseased tree, thereby creating a buffer zone which would prevent citrus canker from spreading any further.
>
> In March 1999, the Citrus Canker Technical Advisory Task Force, a body of regulatory individuals, scientists and citrus industry representatives who deal with the issue of citrus canker, unanimously recommended that the Department adopt a policy to destroy trees within a 1900 foot radius of a diseased tree in order to eradicate citrus canker.

Florida courts have wrestled with various issues pertaining to the CCEP and the balance between fighting a virulent pathogen that spreads quickly and threatens both the State's citrus industry and residents' welfare and affording citizens the highest possible measure of due process and access to judicial review.

The case at hand stems from Grimm's assertion that the Department employees had no right to enter his yard and inspect his citrus trees without a search warrant. At the time of the inspection, no Florida court had required a warrant for such inspections or declared such inspections unconstitutional. In 2003, however, three years after the inspection at issue in this case, Florida's Fourth District Court of Appeal analyzed the warrant requirement and concluded that certain parts of a yard may be deemed curtilage and concluded that the Department must procure a warrant to inspect trees for citrus canker. *Dep't of Agriculture v. Haire,*

836 So. 2d 1040, 1054-5 (Fla. 4th DCA 2003). Nonetheless, the district court dismissed Grimm's lawsuit and the Eleventh Circuit affirmed the dismissal.

ARGUMENT

I. GRIMM HAS NOT IDENTIFIED ANY BASIS FOR THIS COURT'S LIMITED JURISDICTION.

While the parameters for Supreme Court Jurisdiction are malleable, a litigant seeking this Court's review must typically establish a threshold basis for jurisdiction. Ordinarily, such jurisdiction arises when a conflict exists among the Circuit Courts of Appeal, when a court of last resort decides a question of federal or constitutional law that conflicts with this Court's jurisprudence, or when a decision depends upon an interpretation of federal law that should be decided by this Court but remains unresolved or an interpretation that violates federal law. None of the jurisdictional prerequisites are implicated in this case.

On the contrary, this Court addressed the contours and scope of qualified immunity in *Hope v. Pelzer,* 536 U.S. 730 (2002). Therefore, qualified immunity jurisprudence is settled, and there is neither a split among circuits nor an unresolved question of federal law. Indeed, *Hope* arose out of the Eleventh Circuit, which had direct experience with this Court's application of the appropriate qualified immunity standard. Moreover, the Eleventh Circuit applied *Hope* when it dismissed Grimm's Complaint, and Grimm does not now raise any issue suggesting that the Eleventh Circuit erred in that application. Similarly, Grimm has not alleged or established a violation of the Fifth Amendment or the Equal Protection clause. Therefore, this Court should decline to extend jurisdiction and reject his Petition.

II. THE ELEVENTH CIRCUIT CORRECTLY AFFIRMED DISMISSAL OF GRIMM'S COMPLAINT BECAUSE THE LAW GOVERNING THE DEPARTMENT'S RIGHT TO INSPECT DOORYARD CITRUS LEAVES WAS NOT ESTABLISHED AT THE TIME OF THE ALLEGED FOURTH AMENDMENT VIOLATION.

Qualified immunity affords broad protection to "all but the plainly incompetent or those who knowingly violate the law." *See Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Hutton v. Strickland*, 919 F.2d 1531, 1537 (11th Cir. 1990); *Tillman v. Coley*, 886 F.2d 317 (11th Cir. 1989). Qualified immunity is evaluated by an objective standard. *Courson v. McMillian*, 939 F.2d 1479, 1487 (11th Cir. 1999). A government official proves that he acted within discretionary authority by showing objective circumstances which would compel the conclusion that the actions were undertaken pursuant to performance of duties and within the scope of his authority. *Id.* (citing *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983)).

To defeat the qualified immunity defense, Grimm had to "prove the existence of a clear, factually defined, well recognized right of which a reasonable [government official] should have knowledge" and that a reasonable official would have understood that his actions would have violated that right. *See Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989).

When the Department employees entered Grimm's yard for the limited purpose of inspecting leaves on citrus trees, they operated under a good faith belief that exigent circumstances authorized the inspection without a warrant. Even if a law enforcement officer engages in conduct that

violates a person's constitutional rights, he or she may avoid personal liability if it was not reasonably clear that the conduct at issue violated such a right. Qualified immunity operates to "ensure that before they are subject to suit, officers are on notice their conduct is unlawful." *Hope,* 536 U.S. at 739.

Following *Hope*, this Court narrowed the application of qualified immunity to some degree, but did not undermine the extraordinary protection from suit the doctrine provides. Under the *Hope* decision, evaluating qualified immunity requires a Court to first determine whether a constitutional violation exists. If so, then the Court considers whether the contours of that right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 739. Under this analysis, an official must have "fair warning" that his or her conduct deprived the victim of a constitutional right. *Id.* at 739 (citing *United States v. Lanier,* 520 U.S. 259 (1997)). *Hope* narrowed the scope of qualified immunity slightly by holding that prior case authority need not be materially similar in order to serve as fair warning that certain conduct violates a person's constitutional rights. *Hope,* 536 U.S. at 739. In order to apply *Hope,* however, it is imperative to analyze the case within the context of its facts and to recognize that certain fundamental rights are so obvious, that fair warning is presumed.

In *Hope,* prison guards chained a prisoner to a hitching post for seven hours, depriving him of water and food and taunting him as he suffered. The Court concluded that such treatment, which transpired after alleged misconduct by the inmate, served no true penal purpose and violated the prisoner's Eighth Amendment right to be free from cruel and unusual punishment. *Id.* at 738. Reversing the Eleventh

Circuit's analysis and holding as too rigid, the Court determined that basic principles of fundamental human dignity need not be articulated by prior judicial authorities to provide fair warning to law enforcement officials that the subject conduct violated the Eighth Amendment. *Id.* at 738.

The case at hand, however, is fundamentally different and *Hope* does not undermine the Eleventh Circuit's conclusion. Indeed, unlike the conduct condemned in *Hope,* which violated basic principles of human dignity, the conduct at issue in this case—the inspection of citrus trees in someone's yard—constituted at worst a minimal intrusion that, to the Department employees, could not be perceived as a Fourth Amendment violation. Moreover, existing Florida statutes, administrative codes, and case authority makes reasonable the Department employees' belief that such a warrantless search was authorized and lawful.

A. Respondents reasonably believed that they were authorized to conduct a warrantless search under the exigent circumstances exception to the warrant requirement.

Grimm relies primarily on the landmark decision of *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967), which he asserts put the Department employees on fair notice that their actions were unlawful. *Camara*, however, was factually distinct and contained exceptions to the warrant requirement, such that Respondents had good reason to believe that *Camara* did not prohibit their conduct.

Camara did not clearly establish that warrantless searches under longstanding state statutory authority in an

agricultural plant disease emergency were unreasonable under the Fourth Amendment. Moreover, *Camara* did not provide fair warning to the Department employees that mere entry and inspection of trees violated the Fourth Amendment. *Camara* did not involve an emergency situation as is always present with a rapidly-spreading disease. In *Camara*, an ordinance permitted city officials to enter "any building, structure, or premises" to "perform any duty imposed on them." 387 U.S. at 526. The intrusion in *Camara* was far more invasive, because there, the statute allowed the entrance into a dwelling without any probable cause for inspection. *Id.* Here, the Department employees, in the midst of a plant disease emergency that seemingly provided probable cause for inspecting citrus trees, inspected only dooryard citrus, without entering any dwelling place.

Moreover, there are two exceptions to *Camara* where courts have dispensed with warrants for some searches that appeared to apply. First, the *Camara* Court recognized that exigent circumstances would obviate the need for a warrant: "Since our holding emphasizes the controlling standard of reasonableness, nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law was traditionally upheld in emergency situations." The seizure of unwholesome food products or to prevent the spread of disease constitutes an exigent circumstance for which a warrantless search or seizure is appropriate. 387 U.S. at 539. The Supreme Court cited cases where the emergency involved unwholesome food, human disease, and animal disease. *See North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306 (1908) (seizure of unwholesome food); *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905) (compulsory smallpox vaccination). Indeed, courts have historically applied this analysis when facing emergencies that threaten

livestock, even if such emergencies do not pose an imminent threat to human life. For example, in *Kroplin v. Truax*, 165 N.E. 498 (Ohio 1929), the Court recognized the need for immediate destruction of tubercular cattle. So, too, did Florida law require the immediate destruction of a plant pest that poses an emergency. *See* § 581.111, Fla. Stat. (2000) (defining "emergency" as "any situation in which the department has declared a plant pest or noxious weed to be a public nuisance or when in the opinion of the department a plant pest or noxious weed endangers or threatens the horticultural and agricultural interest of the state").

The Florida Legislature, the Commissioner of Agriculture, and Florida courts have characterized citrus canker as an emergency that required immediate action. In *Denny v. Conner,* 462 So. 2d 534, 536-37 (Fla. 1st DCA 1985), the court recognized that "the threat to the public interest in the citrus industry represented by citrus canker is of sufficient gravity and urgency that the effect of the immediate final order of the department should not be further stayed by this court." *See Nordmann v. Florida Dep't of Agriculture,* 473 So. 2d 278, 279 (Fla. 5th DCA 1985) (approving the Department's emergency measures, and rejecting the owner's contention that the Department has "failed to show imminent danger justifying use of the state police power to destroy the trees"); *Sapp Farms, Inc. v. Dep't of Agriculture*, 761 So. 2d 347, 348-49 (Fla. 3d DCA 2000) (relying on *Denny* and upholding the Department's ability to remove trees exposed to citrus canker); *Dep't of Agriculture v. Sun Gardens, LLP,* 780 So. 2d 922, 924 (Fla. 2d DCA 2001) (recognizing the Department's finding of "possibly devastating effect of citrus canker on the citrus industry"); *Dep't of Agriculture v. Pompano Beach*, 792 So. 2d 539, 542 (Fla. 4th DCA 2001); *Haire*, 836 So. 2d 1047-50 (recognizing

Legislature's ability to protect citrus industry in agricultural emergency).

On June 15, 2000, in adopting amendments to the plant disease laws of Florida, the Florida legislature recognized the increasingly-acute nature of this emergency. The legislature made several findings:

- an emergency exists in the South Florida area regarding the spread of citrus canker, a bacterial disease that damages fruit, weakens and eventually kills trees, is highly contagious, and the presence of which causes quarantines to be imposed on the shipment of fresh fruit;

- joint state and federal attempts to eradicate citrus canker have so far been unsuccessful;

- despite destruction of citrus trees infected with citrus canker and of citrus trees within 125 feet of canker-infected trees, citrus canker has spread at an alarming rate and is now present throughout Miami-Dade County and Broward County;

- if not eradicated quickly, citrus canker will spread to other parts of the state and may destroy the citrus industry and dooryard citrus throughout Florida;

- recent scientific studies have shown that citrus trees as far as 1,900 feet from infected citrus

> trees will develop the disease from wind-blown rain or by other means.

See Ch. 00-308, Laws of Fla. No court had challenged the Legislature's findings at the time the Department employees inspected Grimm's tree.

B. The Department employees reasonably believed that the inspection of Grimm's tree was exempt from the warrant requirement under the traditionally regulated sector exception.

Second, the status of citrus as a traditionally regulated sector in the livelihood and economy of Florida made warrantless searches seemingly plausible. This Court had recognized that a search warrant is not generally required in state sectors that have been pervasively regulated and subject to close supervision and inspection. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). *Accord Blue v. Koren*, 72 F.3d 1075, 1080 (2d Cir. 1995) (extensive warrantless surveys and inspections valid regardless of motive because of strong governmental interest and pervasively regulated nursing industry); *United States v. Argent Chem. Lab, Inc.*, 93 F.3d 572, 574 (9th Cir. 1996) (warrantless search and seizure of veterinary drugs valid because of strong state interest in controlling misuse).

Agriculture, plant pests, and citrus have been pervasively regulated in Florida. *See generally* Chs. 570-604, Fla. Stat. (2000), and especially Chs. 570 and 581; Chs. 5A-5L, Fla. Admin. Code, and especially Ch. 5B. In particular, the Florida legislature had authorized the Department to control and eradicate plant diseases. *See* § 581.031(7), (15), (17), Fla. Stat. (2000). Indeed, Florida had fought against citrus

canker and other agricultural pests for many years, and agriculture, particularly disease-susceptible plants, have been regulated in Florida for over 100 years. *See* Fla. Const. of 1885, art. iv, § 20 (creating post of Commissioner of Agriculture); Ch. 581, Fla. Stat. (historical note documents creation of State Plant Board in 1927 to control agricultural pests); *Richardson v. Baldwin*, 124 Fla. 233, 168 So. 255 (Fla. 1936) (reciting duties of State Plant Board). The destruction of trees infected or exposed to citrus canker, under the power conferred in the Florida Statutes, was recognized by the Florida Supreme Court after the initial 1985 outbreak of canker in this state. *Dep't of Agriculture v. Polk,* 568 So. 2d 35, 37-40 (Fla. 1990).

In order for warrantless administrative search to be reasonable, there must be a substantial state interest behind the regulatory scheme; the search is necessary to further that scheme; and the authorizing statue is an adequate substitute for the warrant requirement in giving notice to owners and limiting discretion of those conducting the search. *See New York v. Burger*, 482 U.S. 691, 702-704 (1987) (warrantless search of automobile junkyard valid because conducted pursuant to statute, necessary to further state interest in detecting stolen cars, and discretion of officer conducting the search limited); *Showers v. Spangler,* 182 F.3d 165, 172 (3d Cir. 1999) (warrantless administrative search of taxidermist's business would be valid if taxidermy were pervasively regulated business); *United States v. Cobb,* 975 F.2d 152, 156 (5th Cir. 1992) (warrantless administrative search of trucking company justified because part of company's business included pervasively regulated motor vehicle salvage operation); *United States v. Branson,* 21 F.3d 113, 116 (6th Cir. 1994) (warrantless administrative search of auto repair shop valid because of business' statutory

regulation); *LeRoy v. Illinois Racing Bd.*, 39 F.3d 711, 713-14 (7th Cir. 1994) (warrantless administrative search of racehorse owner's automobile at race track valid because horse racing pervasively regulated industry); *Schwartz v. Pridy,* 94 F.3d 453, 457 (8th Cir. 1996) (warrantless administrative search justified because auto parts industry was pervasively regulated); *Winters v. Board of County Comm'rs,* 4 F.3d 848, 853 (10th Cir. 1993) (warrantless administrative search of pawnshop valid because pawnshops are pervasively regulated); *Moore v. State*, 442 So. 2d 215, 216 (Fla. 1983) (warrantless administrative searches of automotive repair shops constitutional). It was not clearly established that warrantless citrus canker inspections did not fit within this framework at the time the Department employees inspected Grimm's trees.

Moreover, to the Department employees, working in the field and unschooled in the nuances of Fourth Amendment jurisprudence, *Camara* does not support a holding that the law was clearly established that warrantless searches under the CCEP were unconstitutional at the time of the inspection. On June 19 and 20, 2000, when the Department employees entered Grimm's property, no Florida court had declared the applicable statutes or rules unconstitutional on Fourth Amendment grounds. Two circuit court judges did subsequently rule that warrantless searches were unconstitutional. One decision was vacated on appeal, and the other withstood scrutiny. *See Dep't of Agriculture v. Miami-Dade County*, 790 So. 2d 555 (Fla. 3d DCA 2001) (vacating trial court decision); *Dep't of Agriculture v. Haire*, 836 So. 2d 1040 (Fla. 4th DCA 2003), *aff'd,* 870 So. 2d 774 (Fla. 2004). In *Miami-Dade County,* the earlier decision, Judge Gerald Cope, concurring, opined that the Third District should address the warrant issue and intimated that a warrant

is not required under the circumstances presented. As he wrote:

> The County and the City appear to take the position that the entirety of a homeowner's yard qualifies as cartilage and that the Department cannot enter into any part of the yard without a search warrant. That position is incorrect.

Id. at 559. That the majority of the Third District Court of Appeal at that time decided not to reach the warrant issue is irrelevant for purposes of qualified immunity analysis. Indeed, if a member of Florida's Third District Court of Appeal, in hindsight and with considerable deliberation, believed that a warrant was not required in every case when the Department inspected citrus trees on a person's yard, then it was reasonable for the Department employees in the field to believe that they were not violating Grimm's Fourth Amendment rights when they conducted their inspection one year earlier.

Grimm's argument that the Eleventh Circuit disregarded federal law is misplaced. Both the district court and the Eleventh Circuit Court of Appeal considered all constitutional law, both from federal and state courts in the context of determining whether *Camara* had ever been applied in circumstances of searches pursuant to the CCEP. Nonetheless, no federal court at that time, or since, has opined on the issue whether a warrant is required for a citrus canker inspection. The law that has developed since the time of the inspection of Grimm's property is found in Florida state appellate court decisions exclusively. Therefore, the Eleventh Circuit correctly evaluated and applied Florida as well as federal law pertaining to the CCEP and the warrant requirement generally.

III. THE ELEVENTH CIRCUIT CORRECTLY CONCLUDED THAT THE MERE ENTRY ONTO GRIMM'S PROPERTY TO INSPECT CITRUS LEAVES DID NOT CONSTITUTE A TAKING AS DEFINED IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Grimm argues that that the mere inspection of his trees and entry into his yard constituted a taking requiring compensation under the Fifth Amendment to the United States Constitution. The District Court held, and the Eleventh Circuit affirmed, that Grimm had failed to plead a taking because no property had been taken in the inspection.

Grimm argues that the search itself, without more, constituted a taking in both the regulatory and physical sense. There was a physical taking, Grimm argues, because he was deprived of his "right to exclude others" during the search. The concept of a taking under the Fifth Amendment does not extend as far Grimm contends. Under Grimm's logic, every search—indeed even every infringement of a constitutional right—would constitute a taking requiring compensation as an inverse condemnation. This removes any distinction between inverse condemnation and search and seizure.

Grimm did not plead either a physical or regulatory taking. A physical taking claim requires a "permanent physical occupation," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434 (1982), which was not alleged. A regulatory taking claim requires that the property owner be denied "economically viable use of his land." *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1072 (11th Cir.

1996). Grimm does not plead that any economically viable use of his property was denied by the citrus canker inspection, and he would have no basis for such a contention.

The philosophy of the courts has been to consider a search a search and a seizure a seizure:

> Cassettari also argues that when the County took his property without paying him for it, the County violated his fourth amendment right to be secure against unreasonable seizures. This argument is without merit. A claim for the taking by a state of private property for public use without just compensation is properly asserted under the fifth and fourteenth amendments.

See Cassettari v. County of Nevada, 824 F.2d 735 (9th Cir. 1987). Grimm suffered a search, but not a seizure. Case law does not extend to consider every purported violation of a liberty interest to be an act of inverse condemnation.

Grimm also argues that the possibility of re-entry onto land one or twice a year in the future amounts to a permanent physical occupation. The mere possibility of a future search does not amount to a permanent or continuous taking, as was addressed in *Loretto*. There is no continuous passing to and fro. The inspections are rare and irregular, and will cease with the termination of the CCEP.

Grimm argues that *Hope* supports his takings claim because mere novelty does not preclude application of established legal principles (Petition at 8). This argument does not change the analysis. First, Grimm has not identified any existing body of case law that would put anyone on

notice, or that even supports the position, that a warrantless inspection without seizure equates to a taking under Fifth Amendment jurisprudence. Second, the Department employees did not seize Grimm, as he argues (Petition at 9). It was allegedly a deputy sheriff—not the Department employees—who Grimm complains "seized" his person by escorting the Department employees. Regardless, the sheriff's actions in this case did not amount to a seizure or a restraint of Grimm's liberty. Grimm was never under any restraint and was, by his own factual account, free to leave or enter his dwelling at any time. A temporary prohibition on the right to exclude others from one's yard does not constitute a seizure or an infringement on one's personal liberty interest. The Eleventh Circuit appropriately rejected this argument.

IV. THE DISTRICT COURT CORRECTLY DISMISSED GRIMM'S EQUAL PROTECTION CLAIM BECAUSE GRIMM DID NOT ALLEGE DIFFERENTIAL TREATMENT OR DISCRIMINATORY MOTIVE.

Grimm argues that the search of his property violated his right to equal protection under the Fourteenth Amendment (Petition at 11). The district court held that Grimm failed to plead a violation of his right to equal protection because Grimm did not plead he was treated differently or that there was any discriminatory motive or purpose. Grimm contends that the classification of his property as "quarantined" is a specific class and then confuses the Fourth Amendment with equal protection principles (Petition at 12). These doctrines do not overlap, and the Department's mere inspection of citrus trees within a zone of exposure to canker-infected trees does not suggest discriminatory motive or purpose or include Grimm in a protected class. *Cross v. State of Alabama,*

State Dep't of Health and Mental Retardation, 49 F.3d 1490, 1507-8 (11th Cir. 1995). Again, the Eleventh Circuit appropriately rejected this argument.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 1 - 2004
OFFICE OF THE CLERK

No. 04-168

IN THE SUPREME COURT OF THE UNITED STATES

Joseph Lee Grimm,
Petitioner,

v.

Charles S. Spell, a.k.a. Steve Spell,
Peter Vasquez, and
Prosscovia Biribawa,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

The parties to this case are individuals, and no corporate entity is named in any capacity.

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ARGUMENT

This Reply Brief addresses new points raised in two separate Briefs in Opposition; one on behalf of Respondent Charles S. Spell, the other on behalf of Respondents Peter Vasquez and Prosscovia Biribawa. In reference to these separate briefs within the context of this reply, petitioner abbreviates them, respectively, as the "***Spell Brief***" and the "***Vasquez Brief***".

I. THE COURT'S JURISDICTION IS INVOKED UNDER RULE 10(C).

Respondents argue that the Petitioner has "... *not identified any basis for invoking this Court's very narrow certiorari jurisdiction* [***Vasquez Brief***, *p. 1*], and that the ***Petition*** does not qualify under Rule 10(a).

Rule 10 states, in part: "*The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: ... (c) ... a United States court of appeals ... has decided an important federal question in a way that conflicts with relevant decisions of this Court.*"

This Court has broad discretion in granting a petition for writ of certiorari where there are compelling reasons to do so. This Court's repudiation [***Hope v. Pelzer***, *536 U.S. 730, 741*] of the Eleventh Circuit's "*materially similar*" standard was ignored in the Eleventh Circuit's opinion dismissing this case on qualified immunity grounds. The Eleventh Circuit's decision is thus in conflict with this Court on that important matter, and others. The ***Petition*** recites the conflicts and invokes this jurisdiction under Rule 10(c).

II. RESPONDENTS RELY ON SUBJECTIVE BELIEFS, NOT ON OBJECTIVE REASONING.

Respondents claim to have "... *operated under a good faith belief* ..." [Vasquez Brief, p. 7], and that their "... *belief that such a warrantless search was authorized and lawful* ..." is "*reasonable*" under Florida law [*Ibid., p. 9*]. Respondent Spell argues that he reasonably believed that state statute authorized a warrantless, unconsented search of the Petitioner's premises [***Spell Brief**, pp. 7, 8, 11, 13*].

In a qualified immunity case, "*an ... official's subjective beliefs about the legality of his conduct are irrelevant*" [***Herren v. Bowyer**, 850 F.2d 1543, 1546 (11CA, 1988)* citing ***Anderson v. Creighton**, 483 U.S. @ 641*].

This Court effectively squelched the subjective aspect of "*good faith*" (qualified) immunity [***Harlow v. Fitzgerald**, 457 U.S. 800, 816-17*]. Hence, the standard for establishing eligibility for qualified immunity is the "*objective reasonableness*" of an official's material acts; that is, whether those acts "... *violate clearly established statutory or constitutional rights of which a reasonable person would have known*" [*Ibid., p. 819*].

This Court stated that, considering the question of qualified immunity: "*The objective element involves a presumptive knowledge of and respect for 'basic, unquestioned constitutional rights'* " [*Ibid., p. 816*].

Whatever the Respondents may have known or believed about state statutes or administrative regulations is not relevant in this regard, because the Petitioner's basic, unquestioned constitutional rights are guaranteed. It is clear from their arguments, however, that Respondents had no respect for the Petitioner's constitutional rights. There is no warrant exception expressed or implied in ***Fla. Stat. §581.031(15)(a)***; Respondents only assume such. The Courts below erred in finding to the contrary [***Petition Appendix**, pp.*

A-I-9; A-II-13, 14]. Respondents cannot objectively reason that no warrant were required and, therefore, do not meet the test for eligibility for qualified immunity under the ***Harlow*** standard.

Respondents' argument [***Vasquez Brief***, *p. 9*], that a warrantless, unconsented search was "*authorized and lawful*", is a mere declaration of their subjective belief. Respondents are not eligible for qualified immunity, because "*... a reasonably competent public official should know the law governing his conduct* [***Harlow***, *p. 820*]. The law governing search and seizure by Florida officials is in the federal constitution and the decisions of this Court, according to the ***Florida Constitution, Article I, §12*** [see ***Petition***, *p. vi.*], state court decisions to the contrary notwithstanding.

The Respondents repeatedly argue that their beliefs and material acts are "*reasonable*" [***Vasquez Brief***, *pp. 9, 14, 16;* ***Spell Brief***, *pp. 5, 6, 7, 8, 9, 12, 15*]. These claims are directly refuted by this Court. "*Except in carefully defined classes of cases, a search of private property without proper consent is '**unreasonable**' unless it has been authorized by a valid search warrant*" [***Camara v. Municipal Court ...***, *387 U.S. 523, 529-30*]. [Emphasis added.] This holding also directly refutes the findings of the Courts below to the effect that a "*reasonable*" officer or official could conclude that a state statute authorized a constitutional violation [***Petition Appendix***, *pp. A-I-9 and A-II-13*]. This court has written that "*Where rights secured by the federal constitution are involved, there can be no rulemaking or legislation which would abrogate them* [***Miranda v. Arizona***, *384 U.S. 436, 491*] and "*In a situation ... where a constitutional right comes into conflict with a statutory right, the former prevails* [***Gray v. Mississippi***, *481 U.S. 648, 663*].

The Eleventh Circuit errs in finding the Respondents' legal conclusions to be reasonable [*Ibid., p. A-I-9*].

III. THE COURTS BELOW IGNORE THE CANON OF *IN PARI MATERIA*.

The Florida Supreme Court has written that "*It is a recognized rule of statutory construction that statutes which relate to ... the same or closely allied subject or object may be regarded as in pari materia* [***Singleton v. Larson**, 46 So.2d 186, 190*]. This Court has written that "... *the Constitution* [of a state] *and the statutes* [of a state] *are to be taken together as making one body of law* [***Whitman v. National Bank**, 176 U.S. 559, 563*].

Respondents assert " ... *statutory authority to conduct a warrantless search ...*" [***Vasquez Brief**, p. 1*], and that they reasonably believed that such a warrantless search was justified by exigent circumstances [*Ibid,. p. 7, 9*]. Also, "... *Fla. Stat. 581.031 (2000), on its face, plainly authorized the Department Inspectors to inspect Grimm's trees without a warrant* [***Spell Brief**, p. 2. See also: Ibid., pp. 7-8, 13, 14, 15*]. The Eleventh Circuit erred in finding in favor of these assertions [***Petition Appendix**, pp. A-1-9*].

Fla. Stat. 581.031** (2000)* is not the only statute that relates to entry by state agents onto private premises. ***Chapter 933 of the ***Florida Statutes*** governs issuance and service of warrants. The ***Florida Constitution, Article I, §12*** governs search and seizure under the ***Fourth Amendment*** as interpreted by this Court [***Petition**, p. vi*]. As a matter of law, these govern the Respondents' material acts with equal, or greater, force and authority than do ***Fla. Stat. §581.031*** and ***F.A.C. 5B-58.001***. This Court has held that:

> *When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent. ... Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would*

> *obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.* [***Johnson v. United States***, *387 U.S. 541, 546*]

State law *in pari materia* prohibits the Respondents' material acts. The constraints of the law are as valid as its authority. Accordingly, Respondents' reliance on a narrow-scope selection of state law for their authority is contrary to established legal doctrine.

IV. NO EXIGENCY/EMERGENCY EXCEPTION TO THE FOURTH AMENDMENT EXISTS IN THIS CASE.

Respondents argue anew that their material acts were committed under exigent/emergency circumstances [***Vasquez Brief***, *pp. 1, 9-12*], in spite of the rejection of that argument by the Courts below [***Petition Appendix***, *pp. A-I-8, A-II-8*]. Exigent or emergency circumstances sufficient to overcome the warrant requirements of the Fourth Amendment must involve potential physical injury to persons [***Vale v. Louisiana***, *399 U.S. 30, 34-35*], potential destruction of evidence in a criminal matter [Ibid.], a health threat to persons [***North American Cold Storage v. City of Chicago***, *211 U.S. 306*], or intolerable delay associated with acquiring consent or a warrant [***Michigan v. Clifford***, *464 U.S. 287, 293*], for example.

No circumstance constituting such an exigency or emergency is present in this case. Accordingly, Respondents' arguments of exigent/emergency circumstances are baseless.

V. QUESTIONS OF CONSTITUTIONALITY OF FLORIDA STATUTES ARE IRRELEVANT

The Petitioner does not allege unconstitutionality of any statute, as written. The Petitioner's complaint demands, *ad damnum*, that the Respondents' administration and enforcement of certain statutes be declared unconstitutional.

It is not the language of the statutes that Petitioner argues to be unconstitutional; but rather the material acts of the Respondents under color of those statutes. That Respondents chose to act under color of ***Fla. Stat. Chapter 581*** and ignore ***Chapter 933*** and the ***Florida Constitution*** is a decision they made contrary to law. Respondents had actual notice of the ***Florida Constitution*** via their sworn oaths [***Petition***, *p. 5*].

The state legislature provided constitutional means for the Respondents to execute their statutory and administrative duties. Where consent to entry is denied, a search warrant must be acquired and served in accordance with ***Florida Statutes Chapter 933*** on the basis of probable cause. The standards for search and seizure are specified in the ***Florida Constitution, Article I, §12*** [see ***Petition***, *p. vi*].

Accordingly, the Respondents' arguments about the constitutionality of the statutes in question are irrelevant to the issues in this case [see ***Spell Brief***, *pp. 8-13*].

VI. RESPONDENTS EVADE LEGAL DISTINCTIONS BETWEEN CLOSELY-REGULATED BUSINESS AND PRIVATE DWELLING PROPERTY.

State regulation of certain types of businesses is cited by Respondents to justify violating the Petitioner's constitutional rights [***Vasquez Brief***, *pp. 13-16*]. The Petitioner's premises are occupied by a private dwelling and not used for any regulated or regulatable agricultural purpose [***Petition Appendix***, *p. A-II-3*].

Respondents extrapolate, from a body of case law

concerning business activities, that regulation of the state's citrus industry implicitly authorizes warrantless, unconsented searches and inspections on private dwelling premises [*Ibid., p. 16*]. Respondents cite no decisions of this Court that would support this extrapolation, ignoring the clear language of the ***Florida Constitution, Article I, §12*** [see supra].

Case law upholding the administrative searches of closely-regulated businesses has not been extended to broaden warrantless inspections of private dwelling premises [***Donovan v. Dewey***, *452 U.S. 594, 598*], except where residents therein are under court-ordered sanctions, such as probationers, child-protection situations, family services recipients, welfare recipients, or other "special needs" implicating a legitimate heightened government interest. No such situation is present in the case under petition. The District Court erred in applying "special needs" law to this case [***Petition Appendix***, *A-II-13, 14*].

Accordingly, none of the arguments about closely-regulated businesses is relevant to this case.

VII. RESPONDENTS MISCONSTRUE THE STATE LAW ON CITRUS CANKER ERADICATION.

Fla. Stat. §581.031 is a policy declaration of the Florida legislature in exercise of its constitutional authority. It authorizes the executive branch, through its Department of Agriculture and Consumer Services (DACS), to regulate specific agricultural activities within the state. By Florida law, that regulation is effected according to the rules and regulations set out in the ***Florida Administrative Code*** (F.A.C).

In its administrative capacity as a part of the executive branch, DACS promulgated rules and regulations for its Citrus Canker Eradication Program (CCEP), and published them in ***Chapter 5B-58.001*** of the ***Florida Administrative***

Code.

While ***Fla. Stat. §581.031(15)(a)*** establishes the State's policy on DACS agents' inspection authority, it does not elaborate the procedures or methods by which those inspections are executed; those details are elaborated in the ***F.A.C. Chapter 5B-58.001*** [***Petition Appendix***, *pp. A-II-1 through A-III-10*]. .

The language is explicit: "*This rule ... provides for entry of authorized representatives upon properties where citrus canker is known to exist or upon properties which have been exposed to citrus canker*" [@ ***5B-58.001(2)***]. The rule further provides that "... *owners and occupants of properties on which citrus canker is known or suspected to exist shall permit entry of authorized representatives*" [@ ***5B-58.001(16)***]. Whatever means by which DACS comes to know or suspect that citrus canker exists on a particular property must be lawful. The means by which DACS determines whether a particular property were "exposed" [see ***5B-58.001(1)(g)***] must also be lawful. [Cf. ***Spell Brief***, *p. 2.*]

If an owner or occupant asserts his Fourth Amendment rights and refuses consent to entry by DACS agents, then the law requires that entry not be had without a valid warrant. Respondents' claim, to the effect that ***Fla. Stat. §581.031(15)(a)*** is a blanket authorization for warrantless searches and inspections for plant pests anywhere and everywhere in the State [Spell Brief, pp. 2, 7, 8, 13, 15, 18], is without legal foundation. [see ***Camara***, supra, and ***Michigan v. Tyler***, *436 U.S. 499, 506*, as to administrative search; ***United States v. Dunn***, *480 U.S. 294, 301*, as to curtilage protection; ***Payton v. New York***, *445 U.S. 573, 586-87*, as to warrantless search of a home.]

Assuming that DACS lawfully determines that a particular property is exposed to citrus canker or lawfully learns that citrus canker exists on a particular property, then ***F.A.C. 5B-***

58.001(4) prescribes the procedure to be followed. If this procedure is followed, then, and only then, may DACS execute its "control procedures": destruction and removal of the citrus. Respondents did not follow this procedure.

It is, according to ***Fla. Stat. §581.184(7)***[1], during the destruction and removal process, and only then, that DACS may engage the assistance of the county sheriff. Respondent Spell's reliance on ***Fla. Stat. §581.211*** [***Spell Brief***, *pp. 2, 5, 6, 7, 8, 9, 11*], for authority to enter the Petitioner's property and threaten arrest and incarceration, is also without legal foundation. The grant of authority under ***Fla. Stat. §581.031(15)(a)*** is limited to DACS agents.

Respondent Spell acted beyond the limits of his "discretionary authority", and he is not eligible for qualified immunity, according to the ***Harlow*** standard. [Cf.: ***Petition***, *pp. 1-5*; ***Spell Brief***, *p. 3*]

Respondents Vasquez and Biribawa have no discretion to ignore or flout ***F.A.C. 5B-58.001***. Accordingly, they can have no "*discretionary authority*" under the circumstances of this case, and do not meet the ***Harlow*** standard to be eligible for qualified immunity.

IV. PETITIONER'S FOURTH AMENDMENT CLAIM DOES NOT PROSCRIBE THE FOURTEENTH AMENDMENT CLAIM.

Respondents argue that "*...the Fourth Amendment governs this case and not the more attenuated ... Fifth Amendment ...*" [***Spell Brief***, *p. 17*]; and, that the Petitioner "*... confuses the Fourth Amendment with equal protection principles* [***Vasquez***

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1. The Eleventh Circuit panel erroneously numbers this subsection as "581.184(**9**)" [***Petition Appendix***, *p. A-1-4*], which did not exist in the 2000 edition of the statute.

***Brief**, p. 19*]. A Fourth Amendment violation can be concomitant with an equal protection violation in the same act, as a matter of law.

This Court has written: *"We reject the view that applicability of one constitutional amendment preempts the guarantees of another. ... Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Federal Constitution's commands."* [***United States v. James Daniel Good Real Property**, 510 U.S. 43*, 48 (***Graham v. Connor**, 490 U.S. 386,* distinguished); citing ***Soldal v. Cook County**, 506 U.S. 56, 71*].

On the basis of the constructive classification of the Petitioner's property as "quarantined", the Petitioner's ***Fourth Amendment*** rights were violated. The ***Nordlinger*** decision [***Petition**, p. 13*] obliges "***heightened review***" of the classification as it was applied, or more accurately mis-applied, to the Petitioner.

IX. CONCLUSION

For the reasons argued above, the arguments of Respondents in opposition to the Petition ought to be rejected, and the Court should grant the petition for writ of certiorari to the Eleventh Circuit in this case.

By the Petitioner, *Pro Se*
Joseph Lee Grimm